Supreme Court, U.S.
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No. 02

In The
Supreme Court of the United States

ALLINA HEALTH SYSTEM CORP., ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, EX REL.
MINNESOTA ASSOCIATION OF
NURSE ANESTHETISTS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. The False Claims Act, 31 U.S.C. §§ 3729-3733, bars a qui tam complaint based upon a prior public disclosure, unless the relator qualifies as an original source, defined as "an individual who has direct and independent knowledge" who "has voluntarily provided the information to the Government before filing an action. . . . " 31 U.S.C. § 3730(e)(4)(B) (1998).

A. Did the Eighth Circuit err in holding that respondent is an original source, despite the fact that it is a corporation, not an individual?

B. Did the Eighth Circuit err in imputing to respondent knowledge gained by its members while acting in the course and scope of their employment with defendant hospitals?

C. Did the Eighth Circuit err in concluding that respondent, which publicly disclosed its allegations before providing any information to the government, made the required pre-suit disclosure?

II. Did the Eighth Circuit err in finding an Article III case or controversy over alleged false claims that caused the government no injury?

III. Did the Eighth Circuit err in holding that respondent could prove defendants knowingly submitted false claims where no regulation prohibited the defendants' conduct, and where defendants relied on government advice that they were billing properly?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Grouped by organizational affiliation, petitioners are Allina Health System, a Minnesota nonprofit corporation; Unity Hospital, Mercy Hospital, John Murphy, and Abbott Northwestern Hospital; and

Midwest Anesthesiologists, P.A., Metropolitan Anesthesia Network, and, in their individual capacity, Mark Sperry, M.D., Gary Baggenstoss, M.D., David Cumming, M.D., John Rydberg, M.D., Thelma M. Albay, M.D., Minda Castillejos, M.D., Teri Heil, M.D., Sang Hong, M.D., Ted Janossy, M.D., Raymond Kloepper, II, M.D., John Magdsick, M.D., Thomas Maggs, M.D., Thomas Polta, M.D., John Roseberg, M.D., Jai Suh, M.D., Jeffrey Yue, M.D.; and

Allen Tank and Health Billing Systems, Inc.; and

The St. Cloud Hospital; and

Anesthesia Associates of St. Cloud Ltd. and, in their individual capacity, Craig M. Johnson, M.D., Gary A. Boeke, M.D., Philip F. Boyle, M.D., L. Michael Espeland, M.D., Alan D. Espelien, M.D., Paul J. Halverson, M.D., Lanse C. Lang, M.D., A. Wade McMillan, M.D., William H. Rice, M.D., Alan A. Reitz, M.D., and Annette E. Zwick, M.D.; and

Anesthesiology, P.A; and

Northwest Anesthesia, P.A. and, in their individual capacity, Bryce Beverlin, M.D., Richard Blomberg, M.D., Jean Boening, M.D., Mitchell Burke, M.D., Rajarao Dwarakanath, M.D., Richard Engwall, M.D., James

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT – Continued

Gayes, M.D., Luis Giron, M.D., Nancy Groves, M.D., Jonathan Gudman, M.D., Richard Johnson, M.D., John Lillehei, M.D., Robert McKlveen, M.D., Judith Meisner, M.D., M. Michael Menzel, M.D., James Musich, M.D., Mark Nissen, M.D., Xavier Pereira, M.D., David Plut, M.D., Jeffrey Shaw, M.D., Richard Skoog, M.D., William Stauffer, M.D., Ofelio Tiu, M.D., Robert Tronnier, M.D., and John Wintermute, M.D.

None of the petitioners have parent companies and no publicly held company has any financial interest in any of the petitioners.

The respondent is the Minnesota Association of Nurse Anesthetists, a nonprofit corporation, incorporated in Minnesota.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Allina Health System, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in *United States ex rel. Minnesota Ass'n of Nurse Anesthetists v. Allina Health System Corp.*, on Jan. 17, 2002.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at *United States ex rel. Minnesota Ass'n of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032 (8th Cir. 2002), and is reprinted in the appendix at App. 1. The opinion of the United States District Court for the District of Minnesota, granting all defendants summary judgment, is reported at 1999 U.S. Dist. LEXIS 23036 (D. Minn. March 16, 1999), and is reprinted in the appendix at App. 49.

JURISDICTION

On March 25, 2002, the Eighth Circuit denied the petition of Allina Health System, et al., for rehearing and/or rehearing en banc. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

False Claims Act, 31 U.S.C. §§ 3729-3733, reprinted at App. 85-118.

Program Fraud Civil Remedies Act of 1986, 31 U.S.C. §§ 3801-3812, reprinted at App. 118-148.

42 C.F.R. § 414.46(c)(1)(iv), reprinted at App. 151-152.

42 C.F.R. § 414.46(d)(3), reprinted at App. 153-154.

42 C.F.R. § 414.451 (1992), published in 57 Fed. Reg. 33898-99 (July 31, 1992), reprinted at App. 154.

42 C.F.R. § 405.552 (1991), published in 48 Fed. Reg. 8938 (March 3, 1983) and amended at 48 Fed. Reg. 39830 (September 1, 1983), reprinted at App. 157.

STATEMENT OF THE CASE

Anesthesia services in hospital operating rooms are commonly provided by a combination of two different types of anesthesia providers – physician anesthesiologists and certified registered nurse anesthetists ("CRNAs"). In the anesthesia care team approach used by hospitals nationwide, a CRNA stays in each operating room with the patient, while an anesthesiologist moves from room to room, providing service to one or more patients concurrently.

The relator's allegation in this case is that the defendants, through their bills to Medicare for providing anesthesia services, knowingly submitted false claims to the United States government in violation of the False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA").

In the 1990s, hospitals across the country restructured their anesthesia departments in order to provide anesthesia services more efficiently. As a result, CRNAs often were no longer employed directly by hospitals, but became employees of, or subcontractors to, practice groups of physician anesthesiologists. This restructuring resulted in no change in the way care was provided to patients, but did change employment relationships.

The Minnesota Association of Nurse Anesthetists ("MANA") is the incorporated trade association of CRNAs

in Minnesota. It opposed this trend in employment structure as impinging on its CRNA members' professional freedom.

In March 1994, two suburban Twin Cities hospitals, defendants Unity and Mercy Hospitals, which are owned and jointly operated by defendant Allina Health System ("Allina"), underwent a reorganization that resulted in CRNAs subcontracting with defendant Midwest Anesthesiology, P.A., to provide CRNA services at those hospitals. In early November 1994, the independent St. Cloud Hospital, in St. Cloud, Minnesota (approximately 80 miles northwest of the Twin Cities) initiated a similar reorganization that resulted in CRNAs leaving the employ of the hospital and becoming employees of defendant Anesthesia Associates of St. Cloud Ltd.

On November 8, 1994, MANA and several individual nurse anesthetists filed an antitrust action in federal court against the hospitals and the anesthesiologists practicing at them. App. 159. MANA alleged that the anesthesia department reorganizations were a conspiracy in restraint of trade, and were in some way designed to cover up or to divide the fruits of false claims to Medicare for anesthesia services.

Throughout the antitrust complaint, MANA repeatedly alleged that the physicians and hospitals it had sued had submitted false claims for anesthesia services provided to Medicare patients. The opening paragraph of that complaint alleged "fraudulent billing in violation of various State and Federal Medicare statutes." Further allegations of false claims to Medicare appeared in paragraphs 44-46, 51-53 and 66 and 68 of the antitrust complaint. App. 171-172; 174. The press widely reported

MANA's allegations of false Medicare claims. App. 201; App. 203.[1]

Seven weeks after filing the antitrust action, with its attendant burst of publicity, MANA filed this qui tam action under the FCA. App. 206. The nonprofit corporation MANA was the sole relator. The initial defendants in the FCA action were the same hospitals and anesthesiologists as in the antitrust action, as well as Anesthesiology, P.A., the anesthesiologist group practicing at North Memorial Hospital, an independent hospital in Minneapolis.[2] After the qui tam action was filed, Abbott Northwestern Hospital in Minneapolis, also owned by Allina, reorganized its anesthesia department. MANA then amended its complaint to include that hospital and the anesthesiologist group practicing there, Northwest Anesthesia, P.A., and 25 of its physician members. MANA ultimately named 65 defendants at five hospitals in four Minnesota cities, alleging over $1 billion in damages and FCA fines and penalties. App. 319.

MANA mailed a copy of the antitrust action complaint to a Medicare office on November 14, 2002, a week after it was publicly filed and its allegations disclosed in the press. This was MANA's only disclosure to the government of the information on which it based its FCA claims before it filed the qui tam action. The government declined to intervene.

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[1] Ultimately, the district court granted summary judgment to all defendants in MANA's antitrust action, a judgment that the Eighth Circuit affirmed. *Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp.*, 208 F.3d 655 (8th Cir. 2000) ("*MANA II*"). *See also Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp.*, 59 F.3d 80 (8th Cir. 1995) ("*MANA I*") (vacating preliminary injunction).

[2] North Memorial was, at the time, considering reorganizing its anesthesia department.

MANA ultimately alleged that the anesthesiologist defendants submitted three categories of false claims: (1) billing Medicare for personal performance of single non-concurrent cases involving both an anesthesiologist and a CRNA (so-called "1:1" or "AA modifier" cases) when the anesthesiologist was present in the operating room for some but not all of the procedure with the CRNA, App. 256-257; (2) billing Medicare for medical direction of concurrent procedures when the anesthesiologist allegedly failed to participate in the patient's emergence from anesthesia App. 249-250; and (3) billing Medicare for medical direction of concurrent procedures when the anesthesiologist misidentified the number of concurrent procedures occurring, App. 256-257; 270; 247-248. In no case did MANA allege that a patient had received unnecessary anesthesia care.

MANA also alleged that the hospital defendants (Allina and its hospitals and the St. Cloud Hospital) billed Medicare "under an improper modifier" for services of employee CRNAs in cases where both an anesthesiologist and a CRNA were medically necessary – a claim that essentially amounted to an allegation of false underbilling. App. 300-301. Finally, MANA alleged that every defendant had conspired with every other defendant to get false claims paid. App. 320-321.

After lengthy discovery, all defendants moved for summary judgment. The district court granted defendants' motion. App. 60.

A panel of the Eighth Circuit affirmed the portion of the district court's judgment dismissing MANA's conspiracy claims and reversed the remainder. App. 1.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully request that this Court grant certiorari because the decision of the United States Court of Appeals for the Eighth Circuit contradicted established law in numerous respects. The Eighth Circuit: (1) injected its own policy preference for a broad class of "original source" relators rather than applying the statutory language chosen by Congress; (2) improperly allowed a corporate entity to proceed as an original source relator; (3) created a split in the circuits on the pre-suit disclosure requirements in the FCA; (4) unconstitutionally asserted federal jurisdiction over MANA's claims against the hospitals; and (5) created a split in the circuits by reversing the district court's grant of summary judgment where no regulation prohibited the conduct alleged to have resulted in false claims, and the undisputed record showed that the defendants had followed contemporaneous government guidance in submitting the claims at issue. All of these errors rise to a level justifying this Court's review of the Eighth Circuit's judgment.

The Court should grant the petition because this case exemplifies the damage that can be done to health care providers as a result of improperly extending the jurisdictional and substantive reach of the FCA. The number of qui tam suits filed against health care providers has mushroomed since the FCA was amended in 1986. Thirty-three qui tam suits were filed in the year after the amendments, while 483 were filed in fiscal year 1999. Almost half of these qui tam filings involved the health care industry. App. 349-352.

Because of the complexity of the federal Medicare regulations, the Department of Justice has cautioned against the potential for abuse in FCA actions against

health care providers. In 1998, Deputy Attorney General Eric H. Holder, Jr., issued *Guidance on the Use of the False Claims Act in Civil Health Care Matters*. App. 353. In that Guidance, Mr. Holder urged Department of Justice attorneys to consider carefully whether billing errors constitute actual fraud. The Guidance also stated that it is important to determine whether a provider had sought guidance from the program agency or its agents, whether the guidance provided was clear, and whether the providers relied on the guidance in making claims. App. 357. The Department of Justice's recognition of the impropriety of pursuing false claims litigation against providers that, like the defendants, relied upon government guidance in submitting Medicare claims also applies to private relators proceeding under the qui tam provisions of the FCA.

I. THE FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION OVER THIS ACTION BECAUSE MANA IS NOT AN "ORIGINAL SOURCE"

Congress provided the qui tam vehicle as an inducement for those with knowledge of false claims to come forward and allow the government an opportunity to recover improperly paid claims for money. *See* H.R. Rep. No. 99-660, at 17 (1986); S. Rep. No. 99-345, at 2 (1986). *See also Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773-78 (2000) (discussing history and purpose of qui tam actions); *United States ex rel. McKenzie v. BellSouth Telecomm., Inc.*, 123 F.3d 935 (6th Cir. 1997); *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699 (8th Cir. 1995). MANA has instead used the FCA as a tool in its marketplace battle with the medical profession. App. 72-73. Congress restricted the

jurisdictional reach of the FCA to prevent such abuses of the qui tam mechanism.

The FCA, in 31 U.S.C. § 3730(e)(4), provides that federal courts lack subject matter jurisdiction over:

> an action . . . based upon the public disclosure of allegations or transactions . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

This statutory restriction on federal jurisdiction is to be strictly construed and doubts resolved against expanding federal jurisdiction. *See, e.g.*, *Horton v. Liberty Mut. Ins.*, 367 U.S. 348, 357 (1961) ("[T]his Court has repeatedly held that [federal] jurisdiction is to be narrowly interpreted.").

Here, the Eighth Circuit affirmed the district court's finding that MANA's qui tam complaint was based upon the earlier public disclosures embodied in the antitrust complaint and the news reports surrounding the filing of that complaint. In so doing, the Eighth Circuit followed "[t]he majority view . . . that a qui tam suit is 'based upon' a public disclosure whenever the allegations in the suit and in the disclosure are the same, 'regardless of where the relator obtained his information.'" App. 22-23, quoting *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992), and citing, *inter alia*, *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 682-85 (D.C. Cir. 1997), and *McKenzie v. BellSouth*, 123 F.3d at 940.[3] The Eighth Circuit, however, impermissibly

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[3] Only the Fourth Circuit continues to apply a more restrictive definition of "based upon." *See United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994).

deviated from the language of the FCA in determining that MANA was an "original source" entitled to pursue a qui tam action.

A. MANA Is Not "An Individual"

In the FCA, Congress defined "original source" as:

> *an individual* who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4)(B) (emphasis added). MANA is an incorporated trade association. The Eighth Circuit erroneously held that MANA is "an individual," dismissing the language chosen by Congress in a footnote. App. at 29-30

In construing a term in a statute, "[t]he first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co.*, 122 S. Ct. 941, 950 (2002) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). "The inquiry ceases 'if the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" *Id.* In *Barnhart*, the Court noted that it has stated,

> time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete. . . .' We will not alter the text in order to satisfy the policy preferences of the [party].

Id. at 956 (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

The Eighth Circuit concluded that "individual" in the FCA's original source provision encompassed not only human beings but also collective organizations such as trade associations and corporations. In so holding, the Eighth Circuit essentially equated the legal meaning of the term "individual" with "person," and nullified the distinction between the two terms.

In the Dictionary Act, 1 U.S.C. § 1, Congress stated that "in determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the word [ ] 'person'. . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." Unquestionably, Congress intended for the term "person" to be broader than "individual." "Person" is a class, and the enumeration following "person" comprises, but does not exhaust, the class. *See Sutherland Statutory Construction*, § 47:18 (6th ed. 2002). An "individual" is only one example of a "person." Any other interpretation would render Congress's decision to use the term "individual" in the FCA original source provision, rather than "person," superfluous. This Court has held that in such instances, the doctrine of *ejusdem generis* applies to reconcile any incompatibility so that all words in a statute can be given effect and none will be superfluous. *See Breiniger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 92 (1989) (citing *Sutherland's Statutory Construction*, § 47:17 (4th ed. 1984). Equating the two terms, as the Eighth Circuit's decision does, strips the term "individual" of the independent meaning Congress gave it.

Additionally, the Eighth Circuit ignored this Court's recent holding in *Stevens*, which has a direct bearing on the meaning of the words "individual" and "person" in the

FCA. In *Stevens*, this Court held that "person" as used in Section 3729 of the FCA has the same meaning as "person" in its "sister act," the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. §§ 3801-3812 ("PFCRA"). 529 U.S. at 786 and n.17.[4] PFRCA defines "person" as "any individual, partnership, corporation, association, or private organization." *Id.* (citing 31 U.S.C. § 3801(a)(6)). Thus, the definition of "person" in PFCRA is also the definition of "person" in the FCA. In both statutes, the term "individual" is clearly confined to its plain meaning of a human being.

In *Barnhart*, 122 S. Ct. at 956, this Court recently reiterated that federal courts are not free to ignore the statutory language chosen by Congress in pursuit of other policy objectives, as the Eighth Circuit did here in its interpretation of the FCA's original source provision. In disregarding Congress's language, the Eighth Circuit expressed an impermissible policy preference for a broader universe of "original source" relators than Congress defined.

The Eighth Circuit opined that Congress could not have intended to preclude organizations from acting as FCA relators because "any such rule would have disqualified the State of Wisconsin from proceeding as relator in [*United States ex rel. Wisconsin v.] Dean*[, 729 F.2d 1100

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[4] The PFCRA and the FCA are statutes *in pari materia* and should be construed together. *See Sutherland Statutory Construction*, § 51:01 (6th ed. 2002); *Maryland v. Garrison*, 480 U.S. 79, 83-84 (1987). This Court in *Stevens* stated that "there is no question that the PFCRA was designed to operate in tandem with the FCA. Not only was it enacted at virtually the same time as the FCA was amended in 1986, but its scope is virtually identical to that of the FCA." *Stevens*, 529 U.S. at 786 n.17.

(7th Cir. 1984)]." App. 32. The Eighth Circuit misconstrued Congress's intent in amending the FCA to address the *Dean* case.

Congress permits relators to be "persons." 31 U.S.C. § 3730(b). In those cases where the allegations underlying a private civil action have been publicly disclosed, however, Congress specifically reserved the right to proceed as qui tam relators to one single category of persons – "an individual." 31 U.S.C. § 3730(e)(4)(B). This deliberate distinction represents a careful balancing of Congress's interest in encouraging private attorneys general but discouraging those who would profit from information already in the public domain. As to the *Dean* case, this Court explicitly left open in *Stevens* the question of whether a state could be a relator in an FCA case. 529 U.S. at 787 n.18. The original source provision of the Act does not preclude such a result (although the language of that provision would preclude states from proceeding as relators if the action was based upon a public disclosure).[5]

To support its expansive definition of "individual" despite Congress's clear and unambiguous language, the

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[5] The *Dean* case focused on the fact that Wisconsin had provided evidence of the false claims at issue to the federal government. Under the FCA as it existed at the time, this disclosure was sufficient to bar the state from proceeding with a qui tam action. *Dean*, 729 F.2d at 1103, citing 31 U.S.C. § 232(c). In the 1986 FCA amendments, Congress removed the bar to qui tam suits merely because the federal government might have somewhere in its files information on which the action is based. Congress also comprehensively rewrote the subject matter jurisdiction provisions of the FCA, enacting 31 U.S.C. § 3730(e). But nothing in the legislative history to the 1986 amendments indicates that when Congress defined an original source as "an individual," the word was not intended to have its plain meaning.

Eighth Circuit improperly relied on *Clinton v. City of New York*, 524 U.S. 417, 429 (1998). In *Clinton*, this Court recognized that "individual" usually refers to a "single human being," but "person" "often has a broader meaning in the law." 524 U.S. at 428 n.13. This Court deviated from the general rule with regard to the Line Item Veto Act in the *Clinton* case only because other factors revealed that Congress intended to expedite a constitutional challenge to that statute by any injured party.[6] Those factors are not present in this case. The *Clinton* holding that "individual" and "person" are interchangeable in the Line Item Veto Act is a narrow exception to the general rule and must be confined to that case. The more recent *Stevens* holding reaffirms the general rule that the two terms are not interchangeable, and expressly applies that decision to the FCA.

This Court should correct the Eighth Circuit's clear error in deviating from the plain meaning of "individual." The Eighth Circuit impermissibly created federal subject matter jurisdiction where Congress intended to foreclose jurisdiction.

B. MANA Did Not Have "Direct Knowledge" Of The Information On Which Its Allegations Were Based

To qualify as an "original source," the FCA also requires that a relator have "direct and independent knowledge of the information on which the allegations are

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[6] Justice Scalia, joined by Justice O'Connor, partially dissented in *Clinton*, arguing against judicial creation of an exception to the long established definition of "individual." Relying on the Dictionary Act, 1 U.S.C. § 1, the dissenters wrote that "corporations, cooperatives, and governmental entities are not 'individuals' under any accepted usage of that term." *Clinton*, 524 U.S. at 454.

based." 31 U.S.C. § 3730(e)(4)(B). The Eighth Circuit concluded that MANA's knowledge was direct because it came from its members and, as a "voluntary unincorporated trade association," MANA had no legal status apart from its members. App. 32. The Eighth Circuit erred. MANA is a nonprofit corporation.[7] App. 363-382. Unlike an unincorporated association, the knowledge of members of a nonprofit corporation is not automatically attributable to the corporation. The member must be an authorized agent. *See, e.g., Fletcher's Cyclopedia Corporations*, Vol. 3 § 814 (Perm. ed. 1994) ("the shareholders of a corporation, individually, are not its agents"); *State v. North Star Research and Dev. Inst.*, 200 N.W.2d 410, 414 (Minn. 1972) ("[nonprofit] members serve the same function that shareholders in a profit corporation serve"). The knowledge of CRNAs, who were hospital employees when they observed allegedly false claims, cannot be imputed to MANA merely because of their membership in the nonprofit corporation.

In support of its argument that MANA acquired its "direct" knowledge from its members, the Eighth Circuit relied on *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). App. 31. *Springfield*, however, involved corporate employees who indisputably acted within the course and scope of their employment when they detected false claims. If a corporate entity could ever qualify as an original source, it could do so only because the knowledge imputed to it from its employee agents was direct. Here, in contrast, MANA's members were acting within the course and scope of their employment with the *hospitals* when they allegedly observed

[7] MANA did not inform the Eighth Circuit of its corporate status.

false claims. *See MANA I*, 59 F.3d at 83. They were not employed by or acting on MANA's behalf.

Circuit courts in *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447 (5th Cir. 1995), and *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548 (10th Cir. 1992), found that corporate relators were not original sources. The Eighth Circuit incorrectly distinguished these cases on the grounds that the corporate relators were formed after discovery of the alleged false claims. App. 31-33. The Eighth Circuit's analysis of these cases, however, did not address the dispositive issue – whether the individuals with direct knowledge of the alleged false claims were acting as agents of the purported original source at the time they obtained that knowledge. The corporations in *Federal Recovery* and *Precision Co.* were not original sources because the individuals actually possessing the knowledge were not agents of the corporation – the date on which the corporations were established was merely proof of that fact.

The distinction between *Springfield* and this case is easily highlighted by a hypothetical: If the Springfield Railway employees had been members of the Sierra Club, could the Sierra Club also have qualified as an original source in that case? Of course not. The direct knowledge of an individual is not attributable to any organization of which she happens to be a member. At most, an individual's knowledge is imputed to the organization – usually an employer – for which she is an authorized agent. The individual CRNA members of MANA were not its authorized agents merely because they were members, and the Eighth Circuit impermissibly permitted MANA to proceed as an original source relator when it had no direct knowledge of the alleged false claims.

C. The Eighth Circuit Deviated From Other Circuits On The FCA's Pre-suit Disclosure Requirements

The Eighth Circuit concluded that the pre-suit disclosure to the government required for an individual to qualify as an original source need not precede public disclosure of the false claim allegations. App. 35 In so holding, the Eighth Circuit rejected the analysis of the D.C. Circuit in *Findley* and the Sixth Circuit in *McKenzie*, both of which have held that in order to be an original source, the relator must provide the information supporting its allegations to the government before the public disclosure. *See Findley*, 105 F.3d at 690 ("[i]t is clear to us that an 'original source' must provide the government with the information prior to any public disclosure"); *McKenzie*, 123 F.3d at 942 (following *Findley*, and stating, "[w]e find it difficult to understand how one can be a 'true whistleblower' unless she is responsible for alerting the government to the alleged fraud before such information is in the public domain"). Ironically, in view of its action in deviating from the plain meaning of the FCA's language in interpreting the terms "individual" and "direct . . . knowledge" in the original source provision, the Eighth Circuit justified its split with the Sixth and D.C. Circuits on the pre-suit disclosure portion of that provision by claiming fidelity to congressional choice of language. App. 34-35.

The interpretation of the Sixth and D.C. Circuits is consistent with the goal of the FCA of encouraging those with knowledge of fraud to come forward at the earliest possible time and to discourage persons with relevant information from remaining silent. The legislative history of the 1986 amendments to the FCA expressly confirms that Congress intended to require a potential relator to

voluntarily provide his information to the government before any public disclosure occurred in order to qualify as an original source. One of the principal sponsors of the amendments stated:

> A person is an original source if he had some of the information related to the claim which he made available to the government or the news media *in advance of the false claims being publicly disclosed.*

132 Cong. Rec. 29322 (1986) (statement of Rep. Berman) (emphasis added).[8] The decisions in *McKenzie* and *Findley* accurately reflect this congressional intent.

The requirement that a putative original source disclose information in his possession to the government before its public disclosure serves to prevent those relators who add nothing to the government's ability to analyze a case from taking a portion of the government's award under the FCA. The public interest goals of the FCA are not advanced by rewarding relators who bring nothing new to the table. *See* Robert Salcido, *The Public Disclosure Bar of the False Claims Act*, Health Care Fraud Litigation Reporter, Vol. 7, Issue 8 (April 18, 2002) (criticizing the Eighth Circuit's contrary holding).

MANA's provision of information to the government constituted the merest feint at compliance with the FCA's pre-suit disclosure requirement. The only "information" MANA provided the government before filing the qui tam action was a copy of the antitrust complaint, which was

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[8] Rep. Berman added this explanation to the amendments' legislative history on October 7, 1986, when the House of Representatives agreed to adopt the Senate's version of the bill containing what is now the current language of the "original source" provision. 132 Cong. Rec. 29315, 29322; *compare id.* at 29317 *with* 31 U.S.C. § 3730(e)(4).

already in the public domain and the subject of newspaper reports. MANA brought nothing to the government's attention that was not already publicly available and added nothing to the government's ability to evaluate and act on the claim.

The Eighth Circuit's decision creates a split among the circuits that this Court should resolve. MANA could not qualify as an original source in the Sixth or D.C. Circuits. The Eighth Circuit's ruling expands federal subject matter jurisdiction under the FCA beyond the limits applied in other circuits and intended by Congress.

II. MANA LACKS ARTICLE III STANDING TO PURSUE CLAIMS AGAINST THE HOSPITAL DEFENDANTS BECAUSE THEIR CONDUCT CAUSED THE GOVERNMENT NO INJURY

Among "the irreducible constitutional minim[a] of standing" is the requirement that the plaintiff have suffered "injury in fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Under the FCA, for a private relator to have standing to pursue a civil qui tam action, the United States must suffer "proprietary injury resulting from the alleged fraud." *Stevens*, 529 U.S. at 771. The sole basis for the relator's standing to assert the government's rights is via a "partial assignment of the Government's *damages* claim." *Id.* at 773 (emphasis added). The measure of damages is not simply what the alleged offender billed, it is "'the amount that [the government] paid out by reason of the false statements over and above what it would have paid if the claims had been truthful.'" *United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47, 62 (8th Cir. 1973), quoting *United States v. Woodbury*, 359 F.2d 370, 379 (9th Cir. 1966).

In this case, the Eighth Circuit affirmed the district court's grant of summary judgment on MANA's claim of conspiracy. With the conspiracy claim dismissed, the only claim remaining against the hospital defendants is a claim for allegedly *underbilling* Medicare for CRNA services in complex cases where Medicare agreed to pay for the services of both an anesthesiologist and a CRNA – so-called "medical necessity" cases. App. 300-301. MANA as a private relator lacks standing to pursue such a claim.

The district court correctly identified that to have standing to pursue an FCA claim against the hospital defendants, a private plaintiff must "demonstrate the existence of a material fact," as to the "amount of damages which the Government sustains *because of the act of that person. . . .*" App. 75, quoting 31 U.S.C. 3729(a) (emphasis added). *Cf. United States v. Bornstein*, 423 U.S. 303, 313 (1976) ("A correct application of the [FCA's] statutory language requires . . . that the focus in each case be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures.").

The regulations under which the hospitals billed for CRNA services on medical necessity cases provided for two levels of service, or "modifiers": a lower medically directed rate; and a higher non-medically directed rate. *See* 42 C.F.R. § 414.451(a)(1) and (2), published in 57 Fed. Reg. 33898-99 (July 31, 1992), and 42 C.F.R. § 414.46(d)(3).

MANA alleged that hospital-employed CRNAs provided anesthesia services with respect to the "medical necessity" cases. App. 300-301. There is no dispute that the Medicare carriers for Minnesota directed the hospitals to bill these cases at the lower medically directed rate, a policy that saved the government money. App. 383-384.

The district court carefully held MANA to the summary judgment standard:

> Presumably, Plaintiff argues that the hospitals should have billed these cases at a higher, non-medically directed rate. . . . *Plaintiff has not responded to this aspect of Defendants' argument* [(emphasis added)]. When viewing Plaintiff's claims with regard to the medical necessity cases, there is no identified damage to the United States Government. The apparent thrust of Plaintiff's claim is that the Defendant hospitals were *underbilling* Medicare when using the improper modifier of "medically directed."

App. 75-76. MANA presented no evidence that the hospitals' billing, considered alone, had caused the government to pay more for the hospitals' services, including services of employee CRNAs, than it should have.

The hospital defendants' liability must be judged only by the alleged damages attributable to their own billing, 31 U.S.C. § 3729(a), not by the alleged misbilling of the independent physicians. "The Act, in short, penalizes a person for his own acts, not for the acts of someone else." *Bornstein*, 423 U.S. at 312.

Because the hospital defendants' charges for CRNA services were at the lower of the only two available rates, the hospitals' actions caused no fiscal injury to the government. As this Court held in *Stevens*, a private qui tam relator lacks Article III standing to pursue a civil claim in such circumstances.

III. THE EIGHTH CIRCUIT'S RULING THAT A RELATOR MAY PROCEED WHERE NO STATUTE OR REGULATION PROHIBITS THE CHALLENGED CONDUCT AND WHERE DEFENDANTS BILLED CONSISTENTLY WITH GOVERNMENT ADVICE HAS NATIONAL IMPORTANCE

The Eighth Circuit's ruling clears the way to trial for any relator who alleges that a health care provider submitted false claims, even when the conduct at issue is not prohibited by Medicare's payment regulations and even when the government itself agreed contemporaneously with the health care provider's interpretation of the regulations. Health care providers nationwide already struggle to comply with Medicare's byzantine regulations and face regular cutbacks in Medicare reimbursement. Now they also face the specter of exorbitant liability for allegedly violating nonexistent regulatory prohibitions.

This case presents an issue of nationwide importance. Contrary to several other circuits, the Eighth Circuit erroneously required the defendants to prove their compliance with phantom rules that have never been written or adopted, instead of requiring MANA first to produce evidence that each defendant knowingly billed contrary to established rules. In this respect, the Eighth Circuit's decision contains two fundamental errors of statutory construction relating to falsity and intent that have wide-ranging significance for all False Claims Act cases.

First, the Eighth Circuit erroneously held that a defendant who engages in conduct not defined or prohibited by any regulation may nonetheless be found to have submitted false bills by reason of such conduct. App. 40. In so holding, the Eighth Circuit has set the Act's "falsity"

requirement adrift by divorcing it from any requirement to prove that a defendant violated a specific legal standard.

Second, the Eighth Circuit erroneously held that a defendant who has billed consistently with and in reliance on the government's guidance may still be held liable for "knowingly" submitting false claims. App. 42-43. Where, as here, the government's agents, including the Medicare carriers and HCFA (now known as the Center for Medicare & Medicaid Services), contemporaneously interpreted the relevant regulations consistently with the defendants' own interpretation and have advised the defendants that their billing practices are proper, *see* App. 393-403, no relator should be permitted to claim a "knowing" violation of the billing regulations.

A. The Eighth Circuit's Ruling Impermissibly Allows Trial On Alleged Violations Of Unwritten Rules

The Eighth Circuit erred in holding that a fact issue exists regarding whether the defendants submitted false claims for violating Medicare criteria found nowhere in the payment regulations. By definition, defendants can be liable under the FCA only if their conduct violates some legal requirement – in other words, if they submitted a false claim. *See* 31 U.S.C. § 3729(a)(i).[9] Yet here, the Eighth Circuit entirely ignored the first essential element of an FCA claim – requiring the relator to provide evidence that the defendants made false claims for payment to the government.

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[9] A false claim is a necessary but not sufficient condition for liability under the FCA. As discussed below, the relator must also show the requisite intent.

The Eighth Circuit declined to analyze whether the relevant Medicare regulations clearly prohibited the defendants' alleged conduct, and instead subsumed the element of falsity within its discussion of intent. App. 38-45. The Eighth Circuit's refusal to consider falsity as a separate yet required element under the FCA ignores clear statutory requirements and is contrary to decisions in other circuits. *See* 31 U.S.C. § 3729(a)(i); *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 696 (2d Cir. 2001); *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 463 (9th Cir. 1999).

The far-reaching impact of the Eighth Circuit's decision is illustrated by the relator's assertion of phantom regulatory requirements. MANA based two claims against the anesthiologist defendants on alleged billing requirements found nowhere in the Medicare regulations. First, MANA alleged a requirement that anesthesiologists stay constantly in the operating room in order to bill Medicare for personally performed cases. Second, MANA alleged anesthesiologists must return to the operating room at the end of the surgical procedure in order to bill Medicare in all cases, whether personally performed or concurrent.

With regard to the alleged requirement of constant physical presence in the operating room, the regulation relevant at the time read in part as follows:

> (c) Physician personally performs the anesthesia procedure . . .
>
> (2) HCFA considers an anesthesia procedure to be personally performed by a physician if it meets one of the following circumstances: . . .
>
> (ii) The physician is *continuously involved* in a single case involving a certified registered nurse anesthetist (CRNA). . . .

App. 151-153 (42 C.F.R. § 414.46) (emphasis added). This regulation does not require that an anesthesiologist stay in the operating room throughout the case. The regulation states only that the physician must be "continuously involved" with the patient, a phrase which is undefined in the regulations. MANA's allegation that the defendants left the operating room – without more – cannot meet the "falsity" requirement under the FCA because the regulation does not require continuous physical presence in the operating room; it requires the anesthesiologist to remain "continuously involved."

Moreover, the defendants' understanding of the phrase "continuously involved" is not an isolated interpretation unique to them. Using the Freedom of Information Act, defendants' expert, a healthcare consultant, investigated interpretations of anesthesia billing regulations nationwide. *See* App. 404. The expert learned that Medicare carriers across the country interpreted Medicare's anesthesia billing regulations as the Minnesota Medicare carriers and defendants did. App. 418-421. This unrefuted evidence, together with the government's guidance described below in Part III.B., leaves no question that, as a matter of law, MANA cannot demonstrate that the defendants submitted false claims in personally performed cases.

With regard to MANA's allegations that anesthesiologists must be present at the conclusion of a surgical procedure, the relevant Medicare regulation reads in part as follows:

> (a) Services furnished directly or concurrently. The carrier will reimburse a physician for anesthesiology services furnished to patients . . . only if . . .
>
> (1) For each patient, the physician – . . .

> (iii) *Personally participates in* the most demanding procedures in the anesthesia plan, including induction and *emergence*. . . .

(42 C.F.R. § 405.552) (1991) (emphasis added). App. 157.

Without examining whether the regulation defines personal participation in emergence, the Eighth Circuit held that a fact issue exists regarding whether defendants submitted false bills to Medicare because they did not return to the operating room at the end of a case. App. 46-47. This holding, like the holding based on the alleged requirement to stay in the room, impermissibly separates the FCA's falsity requirement from any regulatory basis.

Nowhere in the regulations is emergence defined. MANA presented no evidence supported by medical experts of a medical definition of emergence, other than the standard one summarized by defendants' medical experts and adhered to by the defendants:

> [E]mergence is defined as the process of recovering from anesthesia. . . . An anesthesiologist can participate in emergence by checking on the patient in the recovery room and being available at other times in the emergence continuum.

App. 424-425; App. 462. Anesthesiologists' claims cannot be false when they followed this well-established medical definition of emergence in the absence of any contrary regulatory definition. *Cf. Corning Glass Works v. Brennan*, 417 U.S. 188, 201 (1974) ("[W]here Congress has used technical words or terms of art, it [is] proper to explain them by reference to the art or science to which they [are] appropriate.") (internal quotation omitted). Permitting MANA to proceed with claims without a regulatory basis demonstrates the real potential for draconian overreaching under the FCA. Without rectification by this Court, the

Eighth Circuit's decision permits further improper incursions into the provision of health care in this country.

B. The Circuits Are Split On Whether Reliance On Government Advice Is An Absolute Defense To FCA Liability

The Eighth Circuit improperly found a fact question relating to defendants' intent when it stated that differing interpretations of the Medicare regulations at issue raised "a question of fact as to [defendants'] state of mind." App. 40. The Eighth Circuit ignored the intent of Congress and significant contrary authority from other circuits in holding that, despite defendants' reliance on government guidance that they were complying with federal anesthesia billing regulations, defendants could have knowingly submitted false claims.

The FCA defines "knowing" or "knowingly" as "having actual knowledge of the information, or acting in either deliberate indifference to or reckless disregard for the information's truth or falsity." 31 U.S.C. § 3729(b). Congress amended the FCA in 1986 to include this definition of scienter to make "firm . . . its intention that the Act not punish honest mistakes or incorrect claims submitted from mere negligence." S. Rep. No. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272. Scienter is "the knowing presentation of what is known to be false." *United States ex rel. Hochman v. Nackman*, 145 F.3d 1069, 1073 (9th Cir. 1998) (citing *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) ("*Hagood I*")). The phrase "'known to be false' does not mean 'scientifically untrue;' it means a 'lie.'" *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 815-16 (9th Cir. 1995). The Eighth Circuit's decision in

this case abandons this definition of scienter and Congress's intent to preclude liability for innocently undertaken conduct.

Other circuits have held that where the issue of knowing submission of false claims turns on the interpretation of a federal regulation, contract, or statute, and defendants rely on the government's guidance, there can be no "inference that any party involved . . . knew" that its claims for payment were improper. *Hindo v. University of Health Sciences*, 65 F.3d 608, 613-14 (7th Cir. 1995) (affirming grant of directed verdict where defendant relied upon agency's expression of optimism that funding for claim would be available). *See also Hochman*, 145 F.3d at 1076 (defendants do not knowingly submit false claims if they believe their conduct was authorized by regulation or statute; affirming summary judgment); *United States ex rel. Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1479 (9th Cir. 1996) ("*Hagood II*") (affirming summary judgment that defendant did not violate the FCA because it relied on the government and at most "took advantage of a disputed legal issue").

Several circuits have further held that a genuine or good faith belief that one's conduct is proper precludes a finding of the requisite intent necessary for FCA liability. *Mikes*, 274 F.3d at 703-04 (Second Circuit held defendants did not "as a matter of law" submit false claims when they had a good faith belief that services were of medical value); *Oliver*, 195 F.3d at 464 (Ninth Circuit held good faith nature of defendant's actions "forecloses the possibility that the scienter requirement is met"). *Cf. United States v. Levin*, 973 F.2d 463, 470 (6th Cir. 1992) (FCA indictment dismissed because HCFA letters endorsing

conduct of defendants made intent finding impossible as a matter of law).

The Medicare billing rules for anesthesia providers are among the most complex of Medicare's medical specialty regulations. App. 337. The notion that an inference of bad intent can be drawn from the mere existence of competing interpretations of undefined terms in complex regulations defies any reasonable definition of scienter. The Eighth Circuit concluded that "the defendants were on notice of the *possibility*" that the phrase "continuously involved" in 42 C.F.R. § 414.46(c)(2)(ii) required an anesthesiologist's constant physical presence in the operating room in order to bill Medicare for a personally performed case. App. 40 (emphasis added). The Eighth Circuit's conclusion ignored that the defendants sought, received and relied on advice from their Medicare carriers that the phrase "continuously involved" did *not* require an anesthesiologist's constant physical presence in the operating room. App. 393-400; 480. Similarly, the hospital defendants followed Medicare carrier instructions in billing CRNA services on medical necessity cases using the lower medically directed rate. App. 333-335; 383-384; 468-478. No doctor or hospital who relies on government guidance should be subject to claims of knowingly submitting false claims.

In the face of the government's knowledge of, and guidance consistent with, defendants' conduct, other circuits have found that a relator could not show the requisite intent for FCA liability. *See United States ex rel. Durcholz v. FKW Inc.*, 189 F.3d 542, 545 (7th Cir. 1999) (government knowledge and approval of defendants' conduct negates finding of requisite FCA intent); *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d

321, 329 (9th Cir. 1995) (Army's knowledge of change in testing procedures negates finding that defendants knowingly submitted false claims).

The record leaves no question that the defendants had a good faith belief that their conduct fell within the meaning of the relevant regulations. They inquired of the government, putting the government on notice of their conduct, and they followed their Medicare carriers' advice. No bills to the government under these circumstances could amount to a lie or be the result of reckless conduct. *See Wang v. FMC Corporation*, 975 F.2d 1412, 1421 (9th Cir. 1992).

By allowing MANA's claim to proceed, the Eighth Circuit improperly extended the FCA beyond perpetrators of fraud to reach all those health care providers who struggle in good faith with the often nebulous pronouncements of Medicare officials. As a result, doctors and hospitals who acted in good faith face trial and potentially ruinous FCA fiens and penalties, a result Congress plainly did not intend.

CONCLUSION

For the reasons set forth above, petitioners Allina Health System, et al., respectfully request that this Court grant the Petition for Writ of Certiorari and provide such other relief as may be appropriate under the circumstances.

Dated: June 24, 2002

Respectfully submitted,

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 99-2356

Minnesota Association of Nurse Anesthetists, United States of America, ex rel.

Plaintiff-Appellant,

v.

Allina Health System Corp.; Unity Hospital; Mercy Hospital; Mark Sperry, M.D.; Gary Baggenstoss, M.D.; John Murphy; David Cumming, M.D.; John Rydberg, M.D.; Midwest Anesthesiologists, P.A.; Metropolitan Anesthesia Network; Health Billing Systems, Inc.; Allen Tank; Thelma M. Albay, M.D.; Minda Castillejos, M.D.; Teri Heil, M.D.; Sang Hong, M.D.; Ted Janossy, M.D.; Raymond Kloepper, II, M.D.; John Magdsick, M.D.; Thomas Maggs, M.D.; Thomas Polta, M.D.; John Roseberg, M.D.; Jai Suh; Jeffrey Yue, M.D.; Craig Johnson, M.D.; St. Cloud Hospital; Anesthesia Associates, of St. Cloud Ltd.; Gary A. Boeke, M.D.; Philip F. Boyle, M.D.; L. Michael Espeland, M.D.; Alan D. Espelien, M.D.; Paul J. Halverson, M.D.;

Appeal from the United States District Court for the District of Minnesota.

Lanse C. Lang, M.D.; A. Wade McMillan, M.D.; William H. Rice, M.D.; Allan Reitz, M.D.; Annette E. Zwick, M.D.; Anesthesiology, P.A.; Does, I through XX; Abbott Northwestern Hospital, Inc., Sued as Abbott Northwestern Hospital; Northwest Anesthesia, P.A.; Bryce Beverlin, M.D.; Richard Blomberg, M.D.; Jean Boening, M.D.; Mitchell Burke, M.D.; Rajarao Dwarakanath, M.D.; Richard Engwall, M.D.; James Gayes, M.D.; Luis Giron, M.D.; Nancy Groves, M.D.; Jonathan Gudman, M.D.; Richard W. Johnson, M.D.; John C. Lillehei, M.D.; Robert McKlveen, M.D.; Judith Meisner, M.D.; Michael Menzel, M.D.; James Musich, M.D.; Mark Nissen, M.D.; Xavier Pereira, M.D.; David Plut, M.D.; Jeffrey Shaw, M.D.; Richard Skoog, M.D.; William Stauffer, M.D.; Ofelio Tiu, M.D.; Robert Tronnier, M.D.; John Wintermute, M.D.; Does, I through XX (other unknown defendants);

Defendants-Appellees.

United States of America,

Movant

United States of America,

Amicus on Behalf of
Appellant.

Submitted: December 11, 2000
Filed: January 17, 2002

Before McMILLIAN and JOHN R. GIBSON, Circuit Judges, and LAUGHREY,[1] District Judge.

JOHN R. GIBSON, Circuit Judge.

The Minnesota Association of Nurse Anesthetists brought this qui tam suit as relator for the United States, alleging that the defendant hospitals[2] and anesthesiologists[3] had knowingly made false claims on the United

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[1] The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri, sitting by designation.

[2] The defendant hospitals are Unity Hospital, Mercy Hospital, Abbott Northwestern Hospital, and St. Cloud Hospital. Also named as defendants are hospital employees John Murphy and Allina Health System Corp., which is an "integrated health care system." We will refer to all these defendants collectively as the hospitals.

[3] Anesthesiologists are physicians who specialize in anesthesia. The defendant anesthesiologists are Thelma M. Albay, Gary Baggenstoss, Minda Castillejos, David Cumming, Teri Heil, Sang Hong, Ted Janossy, Raymond Kloepper, II, John Magdsick, Thomas Maggs, Thomas Polta, John Roseberg, Jai Suh, Mark Sperry, Jeffrey Yue, John Rydberg, Gary A. Boeke, Philip F. Boyle, L. Michael Espeland, Alan D. Espelien, Paul J. Halverson, Craig Johnson, Lanse C. Lang, A. Wade McMillan, William H. Rice, Allan Reitz, Annette E. Zwick, Bryce Beverlin, Richard Blomberg, Jean Boening, Mitchell Burke, Rajarao Dwarakanath, Richard Engwall, James Gayes, Luis Giron, Nancy Groves, Jonathan Gudman, Richard Johnson, John Lillehei, Robert McKlveen, Judith Meisner, Michael Menzel, James Musich, Mark

(Continued on following page)

States government by mischaracterizing services they had provided to Medicare patients. The Association pleaded that the defendants violated the False Claims Act, 31 U.S.C. § 3729 (1994), by overcharging the government for their services, and that they had conspired among each other to do so. The district court entered summary judgment for the defendants, holding that the Association's own earlier, public disclosure of the information on which this suit is based precluded subject-matter jurisdiction of this suit. The court also held that the Association lacked standing to bring this suit as relator because it had not shown that the mischaracterizations of the services resulted in pecuniary injury to the government. In addition to the jurisdictional and standing rulings, the court also made three holdings on the merits of the Association's case: that there was no showing of intent to defraud the government because the defendants billed in accordance with the advice given them by the Medicare carriers; that the "overwhelming majority of the evidence on the record" established that the defendants did not mischaracterize the services they provided; and that the Association adduced no evidence of conspiracy. We reverse except as to the judgment on the conspiracy allegations, which we affirm.

Nissen, Xavier Pereira, David Plut, Jeffrey Shaw, Richard Skoog, William Stauffer, Ofelio Tiu, Robert Tronnier, and John Wintermute. The Association also joined several practice groups and persons and corporations associated with them: Midwest Anesthesiologists, P.A., Metropolitan Anesthesia Network, Health Billing Systems, Inc., Allen Tank, Anesthesia Associates of St. Cloud Ltd., Anesthesiology, P.A., Northwest Anesthesia, P.A. We will refer to all these defendants collectively as the anesthesiologists.

I.

This case alleges false claims for services rendered under Part B of the Medicare program. The Medicare program is administered by the Department of Health and Human Services through the Health Care Financing Administration, or HCFA. Medicare Part B is a federally subsidized medical insurance program that pays a portion of the insured's medical expenses. The United States reimburses the medical expenses through the HCFA, which, in turn, contracts with private insurance companies to administer and pay claims from the Medicare Trust Fund. *United States v. Mackby,* 261 F.3d 821, 824 (9th Cir. 2001).

The Association represents the certified nurse anesthetists of Minnesota. Nurse anesthetists are registered nurses who administer anesthesia, either alone or under the supervision of an anesthesiologist. The Association claims that the defendant anesthesiologists and hospitals presented false claims for payment by mischaracterizing anesthesia services rendered to Medicare patients from about 1989 to 1997. Four kinds of mischaracterizations are alleged: billing on a reasonable charge basis when the services the anesthesiologists provided did not meet the criteria for reasonable charge reimbursement; billing services as personally performed by the anesthesiologist when the services did not meet the criteria for personal performance; billing as if the anesthesiologist involved were directing fewer concurrent cases than he or she actually did direct; and certifying that it was medically necessary for both an anesthesiologist and anesthetist to personally perform cases that in fact an anesthetist alone personally performed. Understanding the significance of these alleged mischaracterizations requires some

understanding of the Medicare regulations as they existed at the various times in question. We will therefore briefly explain the nature of each allegation before considering the questions of jurisdiction and standing and the merits of the case.

A.

The first type of mischaracterization alleged is that anesthesiologists billed services for reasonable charge reimbursement when they did not render services eligible for such reimbursement. In the early 1980s Congress became concerned that hospital-based physicians were charging Medicare for work performed by hospital employees. S. Rep. No. 97-494, at 22 (1982), *reprinted in* 1982 U.S.C.C.A.N. 781, 797-98. To stop this, Congress directed the Department of Health and Human Services to adopt regulations governing Medicare payments to physicians working in hospitals. Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248, Title I, § 108, 96 Stat. 324, 337 (codified as amended at 42 U.S.C. § 1395xx(a)(1) (1994)). The regulations were to establish criteria for distinguishing between services rendered by a physician to an individual patient, which could be reimbursed on a reasonable charge basis, and services rendered to the provider or to the provider's patient population as a whole, which would be reimbursed on a reasonable cost basis. *Id.* Accordingly, the Department adopted regulations in 1983 outlining when physicians providing anesthesia services would be reimbursed on a reasonable charge basis. Conditions for payment of charges: Anesthesiology services, 48 Fed. Reg. 8902, 8926-28 (March 2, 1983). A physician could be reimbursed for anesthesiology services in a hospital on a reasonable charge basis if:

(1) For each patient, the physician

(i) Perform[ed] a pre-anesthetic examination and evaluation;

(ii) Prescrib[ed] the anesthesia plan;

(iii) Personally participat[ed] in the most demanding procedures in the anesthesia plan, including induction and emergence;

(iv) Ensure[d] that any procedures in the anesthesia plan that he or she d[id] not perform [were performed] by a qualified individual;

(v) Monitor[ed] the course of anesthesia administration at frequent intervals;

(vi) Remain[ed] physically present and available for immediate diagnosis and treatment of emergencies; and

(vii) Provide[d] indicated postanesthesia care.

(2) The physician either perform[ed] the procedure directly, without the assistance of an anesthetist, or direct[ed] no more than four anesthesia procedures concurrently and [did] not perform any other services while he or she [was] directing those concurrent procedures.

42 C.F.R. § 405.552(a) (1983).

If the physician's services did not meet the criteria outlined above, then they were reimbursable only on a reasonable cost basis, as physician services to the provider. 42 C.F.R. § 405.552(b) (1983); 48 Fed. Reg. at 8927.

In its complaint in this case, the Association claimed that the anesthesiologists billed on a reasonable charge basis when they had not met the criteria for reasonable charge reimbursement and that the hospitals actively aided the anesthesiologists in the false billing. Specifically, the Association alleged that anesthesiologists at Unity, Mercy, and North Memorial hospitals commonly billed for medical direction of cases in which they never entered the operating room and of cases in which they were not present at the patient's emergence from anesthesia. At Abbott Northwestern and St. Cloud hospitals, the Association alleged that, while the anesthesiologists were usually present at emergence, they sometimes billed on a reasonable charge basis even though they were unavailable for emergencies (as shown by their failure to answer pages) and were absent at emergence.

B.

Second, the Association alleged that the anesthesiologists billed for personally performing cases when they did not meet the criteria for personal performance of the case.

Effective in 1992, HCFA adopted a three-tier system of payment for anesthesiologists providing anesthesia. 56 Fed. Reg. 59502, 59628 (Nov. 25, 1991) (codified at 42 C.F.R. § 414.46(c) (1992)). Under that system, Medicare would pay the highest rate when the anesthesiologist either personally performed the entire anesthesia case or was "continuously involved" in only one case in which an anesthetist was also involved. When an anesthesiologist billed a case as personally performed, the anesthetist involved would not be entitled to any Medicare reimbursement, unless there were special conditions requiring

attendance of both an anesthesiologist and an anesthetist at once. Sec. 414.46(c)(2). On the second tier, for medically directing two to four concurrent cases, the anesthesiologist would receive a lower rate, which in turn was diminished (during part of the relevant time) by a set percentage for each additional concurrent case. 42 C.F.R. § 414.46(d). At the third tier, the lowest rate was paid for supervision of more than four concurrent cases. 42 C.F.R. § 414.46(e).

The Association alleged that the anesthesiologists billed with the highest-rate "AA" modifier, designating that they had performed cases personally, when they were not continuously present during the case and in fact were simultaneously engaged in other activities, including medical direction of concurrent cases.

The anesthesiologists contend that when an anesthesiologist and anesthetist were both involved in one case, with no concurrent procedures, an anesthesiologist was entitled to designate a case as personally performed so long as he or she met the criteria for medical direction of the anesthetist. Specifically, the anesthesiologists contend that personal performance of a single case involving an anesthetist did not require the anesthesiologist's continuous presence in the operating room, as long as the anesthesiologist was present in the operating suite. Thus, according to the anesthesiologists, when they had only one case at a time, they were entitled to be paid at the higher, "personal performance" rate even though they were performing the same duties otherwise compensated at the lower, "medical direction" rate. The corollary of this theory is that anesthetists would be paid for their work on a case if the anesthesiologist happened to be performing a concurrent case, but would not be entitled to Medicare reimbursement for performing the very same

duties in a case in which the anesthesiologist had no concurrent case.

The Association, on the other hand, contends that in order to be paid the higher rate for personally performing a case, an anesthesiologist had to be more closely involved than was necessary to satisfy the medical direction criteria of section 405.552, and in fact, had to be continuously present with the patient.

C.

The Association also alleged that the anesthesiologists misrepresented the number of cases they were performing concurrently. As we said in section B, the 1992 regulations reduced an anesthesiologist's medical direction fee per case as the number of cases he or she directed increased (up to the maximum of four). 42 C.F.R. § 414.46(d) (1992). This was apparently a short-lived policy, which was changed as of January 1, 1994 to a flat rate per case, no matter whether the anesthesiologist was directing two, three or four concurrent procedures. Omnibus Reconciliation Act of 1993, Pub.L. No. 103-66, § 13516, 107 Stat. 312, 583-84 (1993). The Association alleged that while the 1992 regulations were in force, the anesthesiologists regularly understated the number of concurrent cases they were directing simultaneously in order to get a bigger payment from Medicare than they were entitled to.

D.

Finally, the Association alleges that the hospitals represented in many cases that it was necessary for both an anesthesiologist and anesthetist to personally perform

the case, whereas only the anesthetist actually satisfied the criteria for personal performance.

Congress decided in 1986 that anesthetists' services should be reimbursable under Part B of Medicare on a reasonable charge basis, starting on January 1, 1989. Omnibus Reconciliation Act of 1986, Pub.L. No. 99-509, § 9320, 100 Stat. 1874, 2013-16 (1986). Before this, Medicare did not pay for anesthetists' anesthesia services on a reasonable charge basis. *See* 48 Fed. Reg. at 8927. Even after the law was changed to allow direct reimbursement for anesthetists' services, when an anesthesiologist was involved with only one case at a time and an anesthetist worked on that case as well, Medicare would not ordinarily pay for the anesthetist's services because it was considered inefficient to have both an anesthesiologist and an anesthetist wholly engaged in one case. 57 Fed. Reg. 33878, 33887 (July 31, 1992) ("[W]e are concerned that recognizing medical direction in a single anesthesia procedure would encourage inefficiencies in anesthesia practice arrangements. Our policies should not encourage the involvement of both practitioners in a single anesthesia procedure if either practitioner could appropriately furnish the service alone."). However, if there was some unusual medical necessity requiring the attendance of both anesthesiologist and anesthetist on the same case, Medicare would then pay for both at 100% of their usual personal performance rate. 42 C.F.R. § 414.46(c)(3) (1992); *see* HCFA Transmittal No. B-98-2 (1998). Later, the regulation was amended to allow both anesthesiologist and anesthetist to bill for these "one-on-one" cases even without special medical necessity, but the total payout was to be limited to the amount that would have been paid to the anesthesiologist for doing the case alone. 60 Fed. Reg.

38400, 38416 (July 26, 1995) (proposing payment scheme to begin in 1998).

The Association alleges that in order to collect payment for both an anesthesiologist and an anesthetist performing a single case, the hospitals sometimes certified that there was a medical necessity for both to attend, whereas in fact the anesthesiologist did not assist throughout the case, demonstrating that no necessity existed.

II.

On December 28, 1994, the Association brought this suit on behalf of the United States alleging violation of the False Claims Act, 31 U.S.C. §§ 3729(a)(1) and (2) and (7), conspiracy to violate the Act, and violation of the hospitals' Medicare provider agreements in connection with their anesthesia billing practices. The United States declined to intervene.

At the threshold, we must decide whether we have subject-matter jurisdiction over this case. On November 8, 1994, some seven weeks before filing this case, the Association and several individual anesthetists sued many of the same defendants alleging various federal antitrust and state law violations, again in connection with their anesthesia billing practices. The antitrust complaint alleged:

> [T]he defendant anesthesiology groups and their co-conspirators have engaged in a wide-spread practice of fraudulent billing of anesthesia services in violation of . . . Federal statutes, including § 1128(a)(1)(A). Such violations include, but are not limited to, billing for services that they did not render, billing for operations at which

> they were not present and inaccurately designating operations as one-on-one for Medicare purposes.

The allegations in the Association's antitrust case were immediately reported in the local newspapers in St. Paul and St. Cloud on November 10 and 11. The Association also provided a copy of the antitrust case to the United States government. Only after this publicity did the Association file this False Claims Act case, under seal, as provided by statute.

The district court held that the disclosure of allegations of fraud in the Association's antitrust suit and in newspaper articles about the antitrust suit precluded subject-matter jurisdiction over this qui tam case because of a special jurisdictional limitation in the False Claims Act disallowing suits based on publicly disclosed information, 31 U.S.C. § 3730(e)(4)(1994). In addition to the disclosures the district court cited, the defendants contend that instances of one type of claim alleged by the Association, improper billing of one-on-one cases, were disclosed in the course of an administrative audit before the Association had assembled its allegations, likewise depriving the district court of subject-matter jurisdiction over that claim.

The level of our review of a district court's ruling on subject-matter jurisdiction depends on whether the district court based its determination on the complaint, on undisputed facts outside the complaint, or on findings of fact. *See Osborn v. United States,* 918 F.2d 724, 729-30 (8th Cir. 1990). In this case, the district court limited its jurisdictional inquiry to the complaint and undisputed facts, styling its order as a summary judgment. *See generally id.* at 729-30 (discussing distinction between subject-matter

jurisdiction determination under Fed.R.Civ.P. 12(b)(1) and summary judgment). Therefore, we exercise de novo review, limited to "determining whether the district court's application of the law is correct and, if the decision is based on undisputed facts, whether those facts are indeed undisputed." *Id.* at 730 (quotations omitted).

The limitations on subject-matter jurisdiction over False Claims qui tam cases were enacted as part of the False Claims Amendments Act of 1986, Pub.L. No. 99-562, 100 Stat. 3153, 3157 (1986). The 1986 amendments were an avowed attempt to reinvigorate the False Claims Act after a 1943 amendment and judicial decisions interpreting the 1943 amendment had emasculated the 1863 law. Understanding the Congressional intent expressed in the 1986 amendments therefore requires a review of False Claims Act history.

The original False Claims Act was enacted in 1863 in order to strike back against the fraud of unscrupulous Civil War defense contractors. S.Rep. No. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273. The Act contained a qui tam provision allowing private persons to sue as relators representing the government's interests, and it rewarded relators who prevailed in their suits with a bounty of half the damages and forfeitures they recovered for the government.[4] *Id.* at 10. The large size of the relator's share, which came out of the government's ultimate recovery, had an obvious potential to put the relator and the government at odds with each other.

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[4] Under the current statute the size of the bounty varies, but can be as high as thirty percent of the proceeds of the suit. 31 U.S.C. § 3730(d) (1994).

During World War II there were many qui tam cases against defense contractors, and in one notorious case, *United States ex rel. Marcus v. Hess,* 317 U.S. 537 (1943), the government contended that the relator had simply copied allegations from a criminal indictment already on file. The Supreme Court held that, even if the relator, Marcus, had simply taken allegations from a criminal indictment, the False Claims Act would nevertheless permit him to proceed as relator. *Id.* at 545. In reaction to *Hess,* Attorney General Francis Biddle asked Congress to repeal the qui tam provisions of the False Claims Act. S. Rep. No. 99-345, at 11. Congress refused to go so far, but it did amend the Act to provide that there would be no jurisdiction over qui tam suits "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."[5] 31 U.S.C. § 232(C) (1946); S. Rep. No. 99-345, at 12. The provision was explained as an attempt to curtail parasitical suits in which the informer "rendered no service" to the government. 89 Cong. Rec. 10846 (1943). In *United States ex rel. Wisconsin v. Dean,* 729 F.2d 1100 (7th Cir. 1984), the State of Wisconsin brought a qui tam suit based on Medicaid fraud that it had already disclosed to the federal government. The Seventh Circuit, interpreting the 1943 amendment, held that even though the discovery of the fraud was entirely due to the State's investigation, qui tam jurisdiction was barred because the

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[5] This provision was interpreted to apply only in the event the government declined to take up prosecution of the case itself. S.Rep. No. 99-345, at 12.

federal government knew of the fraud before Wisconsin filed suit. *Id.* at 1104-07.

Within months of the *Dean* decision, the National Association of Attorneys General adopted a resolution urging Congress "to rectify the unfortunate result of the *Wisconsin v. Dean* decision." S. Rep. No. 99-345, at 13. Congress responded. Senate Bill 1562, which became the 1986 False Claims Amendments Act, was introduced shortly after and was "aimed at correcting restrictive [court] interpretations" of the False Claims Act which "tend to thwart the effectiveness of the statute."[6] *Id.* at 4, 13. The goals of the 1986 Amendments Act were (1) to encourage those with information about fraud against the government to bring it into the public domain; (2) to discourage parasitic qui tam actions by persons simply taking advantage of information already in the public domain; and (3) to assist and prod the government into taking action on information that it was being defrauded. *United States ex rel. Mistick PBT v. Hous. Auth.,* 186 F.3d 376, 401 (3d Cir. 1999) (Becker, C.J., dissenting) (citing S. Rep. No. 99-345, at 1-8, 23-24), *cert. denied,* 529 U.S. 1018 (2000).

The 1943 amendments could bar qui tam suits on the ground of information technically in the government's

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[6] In addition to recalibrating the provisions dealing with parasitical suits, the 1986 Amendments Act aimed to "encourage more private enforcement suits," S.Rep. No. 99-345, at 23-24, by various other measures, including increased monetary awards, a lower burden of proof, and a guaranteed role for the relator even when the government intervenes in the action. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.,* 944 F.2d 1149, 1154 (3d Cir.1991).

possession, even if no one in the government knew about the information. 132 Cong. Rec. 22340 (1986) (remarks of Rep. Bedell). The supporters of the 1986 Amendments Act believed that this prevented relators from bringing suits in situations in which their participation was needed and in which the fraud would not be prosecuted without their intervention. In an apparent attempt to correct this shortcoming of the 1943 version of the Act, Congress switched from barring suit on the ground of government possession of information before the relator filed suit to barring suit on the ground of public disclosure of such information. *See id.* (referring to House bill). Congress evidently assumed that if information was publicly disclosed, the government was likely to discover it on its own, without the need for a qui tam relator. *See United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1169 (3d Cir. 1991) (Scirica, J., dissenting).

The 1986 Act also added an important exception to the jurisdictional bar for relators who are "an original source of such information." The relevant section is 31 U.S.C. § 3730(e)(4):

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

Section 3730(e)(4) is crucial to resolving the jurisdictional issue in the present case. Applying the section requires us to answer three questions: (1) Have allegations made by the relator been "publicly disclosed" before the qui tam suit was brought? (2) If so, is the qui tam suit "based upon" the public disclosure? and (3) If so, was the relator an "original source" of the information on which the allegations were based? *See United States v. Bank of Farmington,* 166 F.3d 853, 859 (7th Cir. 1999) (applying tripartite test). Jurisdiction exists only if the answer to one of the first two questions is "no" or the answer to the third question is "yes." The original source inquiry, in turn, has three parts; the relator's knowledge of the information must be (1) direct and (2) independent, and (3) the relator must have voluntarily provided the information to the Government before filing suit.

The Association contends that the goals of the 1986 Amendments, including the intent to revise the law after the unsatisfactory result in *Dean*, would be thwarted by interpreting the 1986 Amendments Act to bar suits by relators who caused the public disclosure of the fraud. However, the various components of the statute have been interpreted by the courts in such a way that, when the pieces are put together, the result is sometimes to bar such actions. *See, e.g., United States ex rel. Dhawan v. New York Med. Coll.,* 252 F.3d 118, 121-22 (2d Cir. 2001) (relator who

disclosed information in state court suit was thereby barred); *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1163 (10th Cir. 1999) (relator whose information was "impetus" for investigation was barred by disclosure of results of investigation); *United States ex rel. Mistick PBT*, 186 F.3d at 389 (relator whose FOIA request brought fraud to light was barred because the government's response to the request was public disclosure); *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 335 (6th Cir. 1998) (relator's state lawsuit disclosed claims and therefore barred federal qui tam suit); *United States ex rel. Devlin v. California*, 84 F.3d 358, 360, 363 (9th Cir. 1996) (relator who fed allegations to newspaper barred because resulting article disclosed fraud); *United States ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1159 (2d Cir. 1993) (relator who caused information to be revealed in the course of discovery in a lawsuit barred thereby). The Association cites a letter by the sponsors of the 1986 Amendments Act reviewing the career of the public disclosure bar in the courts: "Certain courts have exploded this limited bar in ways that mock the very purpose and intent of the 1986 Amendments." Letter from Rep. Howard L. Berman and Sen. Charles E. Grassley to Janet Reno, 145 Cong. Rec. E1540, 1546 (July 14, 1999).[7]

Our task, of course, is to effectuate Congress's intent, and we must interpret the three subsidiary components of

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[7] While legislators' comments regarding the intent of an earlier Congress are entitled to no special weight, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185-86, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994), their legal analysis is entitled to the same consideration as any other commentator's.

section 3730(e)(4) with a view to how they contribute to the effect of the statute as a whole.

> [A] section of a statute should not be read in isolation from the context of the whole Act, and . . . in fulfilling our responsibility in interpreting legislation, we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.

State Highway Comm'n v. Volpe, 479 F.2d 1099, 1111-12 (8th Cir. 1973) (citations omitted).

A.

The first question, whether the allegations have been publicly disclosed, must be answered "yes." The Association essentially concedes that the antitrust suit and the resulting newspaper articles amounted to public disclosure, as the district court held.

However, on appeal the defendants further contend that the Association's allegations were also publicly disclosed through a 1991 audit performed for Medicare by The Travelers, which, as an administrative audit, would qualify as one of the types of public disclosure that could trigger the jurisdictional bar. In the audit, Travelers notified Mercy Medical Center that it had been billing for anesthetists' services in cases in which the anesthetist and anesthesiologist were both working on the same case and no other concurrent cases, known as one-on-one cases.

Review of the Association's claims indicates that this is not one of the practices the Association alleges is fraudulent. The Association contends that some of the

alleged fraudulent practices arose as a response to the 1991 audit, when the hospitals realized they could no longer bill for both the anesthesiologist and an anesthetist's service in routine one-on-one situations, and so began falsely certifying that such cases required the involvement of both an anesthesiologist and an anesthetist. Therefore, the 1991 audit was not a public disclosure of this allegation.

The Association also contends that the anesthesiologists billed for personally performing cases in which they were not "continuously involved" with the patient or case. In contrast, the audit letter does not say that the anesthesiologists were not performing the cases, but instead concludes that they *were* performing them, which meant that the hospital could not bill for the anesthetist's involvement in the same case. Therefore, the audit did not publicly disclose this allegation of fraud, either. The defendants contend that the transactions pointed out in the audit are some of the same transactions on which the Association now bases its claims. The audit may have revealed the fact that the defendants represented that the anesthesiologists performed these cases, but the audit did not state that the anesthesiologists had not in fact done so. In order to bar jurisdiction, a public disclosure must reveal both the true state of facts and that the defendant represented the facts to be something other than what they were. *United States ex rel. Rabushka v. Crane Co.,* 40 F.3d 1509, 1514 (8th Cir. 1994). The audit did not reveal what the Association now contends was the true state of the facts, i.e., that the anesthesiologists were not performing the cases they billed for. Therefore, the audit was not a public disclosure that could bar jurisdiction over the Association's claims.

B.

The second question under section 3730(e)(4) is whether the allegations in the qui tam case were "based upon" the public disclosure. This requires us to address the meaning of those words, a question which has split the federal circuits, but which our court has not yet explicitly addressed.

The minority view, shared only by the Fourth Circuit and one panel of the Seventh Circuit (in schism with another panel),[8] is that "based upon" should be given its ordinary meaning of "derived from," so that the qui tam allegation must have resulted from the disclosure in order to bar jurisdiction. *United States ex rel. Siller v. Becton Dickinson & Co.,* 21 F.3d 1339, 1348 (4th Cir. 1994); *United States v. Bank of Farmington,* 166 F.3d 853, 863 (7th Cir. 1999). The minority bases its reading on a "straightforward textual exegesis" of the phrase "based upon," *Siller,* 21 F.3d at 1348, as well as the policy consideration that a suit not derived from the public disclosure is not "parasitic," and so is not the kind of suit the 1986 Amendments Act was meant to prevent, *Bank of Farmington,* 166 F.3d at 863.

The majority view is that a qui tam suit is "based upon" a public disclosure whenever the allegations in the suit and in the disclosure are the same, "regardless of

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[8] The split of authority is not quite as lopsided as it seems, for the issue has provoked spirited disagreements in some circuits that have adopted the majority view. *See, e.g., United States ex rel. Mistick PBT v. Housing Auth.,* 186 F.3d 376, 394-402 (3d Cir.1999) (Becker, C.J., dissenting), *cert. denied,* 529 U.S. 1018 (2000); *United States ex rel. Jones v. Horizon Healthcare Corp.,* 160 F.3d 326, 336 (6th Cir.1998) (Gilman, J., concurring in result).

where the relator obtained his information." *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992). *Accord United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 682-85 (D.C. Cir. 1997); *United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376, 385-88 (3d Cir. 1999) (qui tam suit based upon disclosure if the disclosure "sets out" allegations or all essential elements of qui tam claim), *cert. denied*, 529 U.S. 1018 (2000); *United States ex rel. McKenzie v. BellSouth Telecom., Inc.*, 123 F.3d 935, 940 (6th Cir. 1997) ("based upon" public disclosure means "supported by" disclosure); *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1017 (7th Cir. 1999) (relevant facts disclosed in media after relator filed administrative complaint and before relator filed qui tam suit; therefore qui tam jurisdiction barred unless relator an original source); *United States ex rel. Biddle v. Board of Trustees of the Leland Stanford, Jr., Univ.*, 161 F.3d 533, 536-40 (9th Cir. 1998); *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552-53 (10th Cir. 1992) ("As a matter of common usage, the phrase 'based upon' is properly understood to mean 'supported by.'"); *Cooper v. Blue Cross and Blue Shield*, 19 F.3d 562, 567 (11th Cir. 1994) (per curiam) ("based upon" means "supported by").

The majority view has a powerful argument to commend it: if a suit is only based upon a public disclosure if it results from the disclosure, as the minority interpretation would have it, then the statute's additional provision allowing suit if the relator is "an original source" of the underlying information is of no effect, because no one could be an original source if his knowledge was derived

from public disclosure.[9] More specifically, a relator's knowledge could not be "independent" of the public disclosure, § 3730(e)(4)(B), if it was derived from the public disclosure. The majority of courts have considered it inconceivable that Congress would have drafted the statute so poorly as to have included a provision that could never have any effect.

There are two considerable objections to this majority rule. First, its reading distorts the plain meaning of the words "based upon the public disclosure," since if the qui tam allegations are not derived from the public disclosure itself, they are not based upon the *public disclosure,* but rather on the *facts* which have been publicly disclosed. Elsewhere in the statute, Congress used the phrase "based

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[9] Chief Judge Becker of the Third Circuit has proposed a reading by which Congress could have used "based upon" in its ordinary sense of "derived from" and still have denoted something different by the "original source" provision. *Mistick PBT,* 186 F.3d at 399 ("[I]t is possible that a qui tam claim need not be derived entirely from public disclosures to fall under the 'based upon' jurisdictional bar, as long as *some* essential element of the qui tam claim is derived from public disclosures. . . . Under this view, a relator who is barred because he has derived some of his fraud information from a public disclosure may still bring the claim as an original source if he has direct and independent knowledge of some other essential element of the claim."). According to his interpretation, a suit derived *in part* from public disclosure may be allowed if it is also partly not derived from a public disclosure.

This interpretation is possible, but not plausible. It requires us to conclude that Congress used the "based upon" language and the "original source" language to refer to the same concept – whether a suit is derived from a public disclosure. Moreover, it would have been much more natural and straightforward for Congress to have said "*partly* based upon the public disclosure" and "original source of *part* of the information" if the distinction between partial derivation and sole derivation had been central to how Congress meant the statute to work.

on the facts underlying the pending action," 31 U.S.C. § 3730(b)(5), which suggests the drafters distinguished between basing a suit on facts and basing it on a disclosure of such facts. The majority's interpretation also distorts the words "based upon" by taking away the causal relation inherent in the phrase. As the Fourth Circuit remarked, "We are unfamiliar with *any* usage, let alone a common one or a dictionary definition, that suggests that 'based upon' can mean 'supported by.'" *Siller,* 21 F.3d at 1349. This objection may well be unanswerable. The Third Circuit, in adopting the majority rule, candidly admitted that the "in ordinary usage the phrase 'based upon' is not generally used to mean 'supported by,'" *Mistick PBT,* 186 F.3d at 386, but concluded that there was elsewhere evidence that the statute was not carefully drafted. *Id.* at 387. Evidently, the words "based upon" were simply not well chosen to express Congress's meaning.

The second objection to the majority view is that the policy justification sometimes given by courts in the majority, if taken to its logical conclusion, would return us to the rule of the *Dean* case, which Congress was specifically attempting to overrule by means of the 1986 Amendments Act. For instance, the District of Columbia Circuit justified its adoption of the majority rule as follows:

> [T]he blocking of freeloading relators who copy their complaints directly from public disclosures is not the FCA's only concern. From its inception, the *qui tam* provisions of the FCA were designed to inspire whistleblowers to come forward promptly with information concerning fraud so that the government can stop it and recover ill-gotten gains. Once the information is in the public domain, there is less need for a financial

> incentive to spur individuals into exposing frauds.

FPC-Boron Employees' Club, 105 F.3d at 685. By this reasoning, once the information is available to the government, the government has no need to pay a relator for disclosing it, even if the relator discovered the fraud in the first instance. Against this, the minority view reasons that by attempting to overrule the *Dean* case legislatively and especially by enacting the "original source" exception to the jurisdictional bar, Congress obviously rejected this one-shot view of its financial interests in favor of a fairness policy. Rather than biting the hand that fed it, Congress apparently chose to take a longer view, reasoning that its interests over time would be served by rewarding informants rather than confiscating their claims whenever it could do so.[10]

The minority objects that the majority's reading of "based upon" throws up a jurisdictional bar in some suits that are not parasitical, in the sense of being cribbed from the public disclosure, whereas the avowed goal underlying the 1986 Amendments Act was to eliminate parasitical suits. *See FPC-Boron Employees' Club,* 105 F.3d at 685 (acknowledging that "our interpretation of the jurisdictional

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[10] At the same time, Congress's view of what a relator deserves to recover is plainly affected by the utility of the information to the government, rather than merely whether the discovery was original or derivative. Thus, section 3730(b)(5) provides, "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." So, once a qui tam action is pending, no new relator can bring suit on the same fraud, no matter how he or she discovered it. Therefore, it is not inconsistent with Congress's scheme that some claimants who are not parasitic nevertheless do not get to be relators.

bar may on occasion prevent *qui tam* lawsuits that may not be truly 'parasitic' "). The minority view contends that by trying to rectify *Dean,* Congress showed a desire to treat relators fairly, which would be frustrated by kicking relators out of court when their claim was not parasitical, but was merely disclosed before the relator had filed suit.

In our view, however, these policy objections disappear if one considers the overall design of the public disclosure provision. Congress's fairness concern is not effectuated by each part of the statute read in isolation, but rather by the statute as a whole. The "based upon" clause serves the concern of utility, that is of paying only for useful information, and the "original source" exception serves the concern of fairness, that is of not biting the hand that fed the government the information. If the "based upon" clause threatens to kick relators out of court because the government does not need them, the "original source" exception reopens the courthouse door for certain deserving relators. Therefore, the majority view reaches the correct result, not because Congress cared nothing for fairness and everything for utility, but because it used two different provisions to strike a balance between these concerns.

Thus, the majority reading of section 3730(e)(4) is consistent with Congress's apparent policy. We also conclude that the majority view, though not free of strain, gives a more coherent meaning to the confusing language of the section than the minority view does. A final factor supporting the majority's reading is that it fits with the drift of our circuit precedent.

Our court has not expressly considered the meaning of the "based upon" clause, although Judge Magill has announced his support of the majority rule in a dissent.

United States ex rel. Rabushka v. Crane Co., 40 F.3d 1509, 1527-28 (8th Cir. 1994). However, in *United States ex rel. Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699, 702 (8th Cir. 1995), we held that a suit was barred because of a public disclosure in newspaper articles that were not published until after one would-be relator had completed its investigation and reported the allegations to the County Attorney. From the chronology of these events, it is obvious that the allegations of the qui tam complaint in *Barth* were not derived from the newspaper articles. Nevertheless, *Barth* parsed the original source provisions, which would have been utterly unnecessary if the suit had not been "based upon" public disclosures, and concluded that the relators could not prosecute the suits because they were not original sources of the information. *Id.* at 704. Because the result in *Barth* would have been different if "based upon" meant "derived from," that case suggests that the issue has been resolved in this circuit, albeit implicitly, consistently with the majority rule.

Having concluded that the majority rule makes better sense of the 1986 Amendments Act and better effectuates the policy goals of that Act, we now explicitly endorse the majority view and hold that the allegations in this case were "based upon" the antitrust case and accompanying newspaper accounts.

C.

Finally, we come to the question of whether the Association was an "original source" of the information disclosed. If not, then there is no jurisdiction over this case. Since we know from the history of the False Claims Act that the original source provision was added in 1986 to

permit claims like the one in *Dean,* in which a claimant investigated the fraud and then revealed it to the government before filing suit, we would expect that the effect of the original source provision is to protect from the public disclosure bar those who first bring a claim to light. However, "original source" is defined in section 3730(e)(4)(B) in a way that does not distinguish between those who first bring a claim to light and others who later make the same discovery independently,[11] and it does not always protect those responsible for the initial disclosure of a fraud claim, *e.g., Barth,* 44 F.3d at 702-04.

Under section 3730(e)(4)(B), a claimant is deemed an original source if he or she (1) has "direct and independent knowledge of the information on which the allegations are based" and (2) has voluntarily provided the information to the "Government" before filing the qui tam suit.[12]

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[11] The Second and Ninth Circuits have held that only a person who caused the public disclosure can be an original source. *Wang v. FMC Corp.,* 975 F.2d 1412, 1418-20 (9th Cir. 1992); *United States ex rel. Dick v. Long Island Lighting Co.,* 912 F.2d 13, 16-18 (2d Cir. 1990). That rule would perhaps be an improvement in the operation of the original source provision, but it has no basis in the statutory language and we therefore decline to adopt it.

[12] The defendants argue that there is an additional requirement that an original source must be a natural person because section 3730(e)(4)(B) says: " 'original source' means an individual. . . . " But if examination of a statute shows "no plausible reason why Congress would have intended to provide for . . . special treatment of actions filed by natural persons and to have precluded entirely jurisdiction over comparable cases brought by corporate persons," *Clinton v. City of New York,* 524 U.S. 417, 429 (1998), the word "individual" does not limit the statute's scope to human beings. *Id.* Neither the 1986 Amendments Act nor a review of its background or legislative history suggests that Congress meant to exclude suits on the basis of whether the relator was

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We have determined that the words "direct" and "independent" were intended to express two ideas, rather than one. *Barth,* 44 F.3d at 703. We have interpreted "independent knowledge" to mean knowledge not derived from the public disclosure. *Id. But see United States ex rel. Fine v. Advanced Sciences, Inc.,* 99 F.3d 1000, 1006-07 (10th Cir. 1996) (independent means independent of anyone else – i.e., the same thing as direct). The independent knowledge requirement clearly serves the congressional goal of barring parasitic actions, but it is worth noting that it does not bar actions based on old news, in which the relator independently discovers information already known to the public. *See Fed. Recovery Servs., Inc. v. United States,* 72 F.3d 447, 452 (5th Cir. 1995) (this situation addressed in 31 U.S.C. § 3730(d)(1), which reduces size of relator's award). There is no doubt that the Association's knowledge was independent of the Association's antitrust case and the newspaper articles based on that case.

But did the Association also have direct knowledge? This term is more problematic. Courts have used various formulations, sometimes looking at the words without any reference to what Congress hoped to accomplish by using the term, and sometimes focusing on the policy of avoiding parasitism without paying much attention to the actual words Congress employed. The Third Circuit cited a dictionary definition of "direct" as "marked by absence of an intervening agency, instrumentality or influence: immediate." *Stinson, Lyons,* 944 F.2d at 1160 (quoting Webster's Third International Dictionary 640 (1976)). We

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a natural person, corporation, or association. We therefore reject this argument.

reiterated this definition in *Barth,* 44 F.3d at 703 (quoting *United States ex rel. Springfield Term. Ry. Co. v. Quinn,* 14 F.3d 645, 656 (D.C.Cir. 1994)). Also in *Barth* we quoted the Ninth Circuit's definition of direct knowledge as "unmediated by anything but [the plaintiff's] own labor," *id.* (quoting *Wang,* 975 F.2d at 1417), which reflects the congressional intent to avoid parasitical suits in which the plaintiff contributed nothing.

The district court held that the Association had no direct knowledge of the information because its knowledge came from its members. The court cited two cases in which corporations were formed after the information had been discovered and disclosed by people who became shareholders of the corporations; in these cases, the corporations were not original sources of the information. *Federal Recovery Servs.,* 72 F.3d at 451-52; *Precision Co.,* 971 F.2d at 554. These cases are easily distinguishable, because they involved a corporate plaintiff that did not exist at the time the information was discovered. No courts have held that corporations responsible for the discovery of information cannot have "direct knowledge" because they have to act through agents. In fact, corporate plaintiffs have been held to have direct knowledge making them an original source. In *Springfield Terminal Railway Co.,* 14 F.3d at 657, the District of Columbia Circuit held that a corporate relator had sufficiently direct knowledge of information to be an original source. *Accord United States ex rel Durcholz v. FKW Inc.,* 997 F. Supp. 1159, 1166 (S.D. Ind.1998). Moreover, in *Barth* one relator was a labor union; although we held that the union had no direct knowledge of the information because its representative did not have such knowledge, we did not suggest organizations can never be original sources. 44 F.3d at 703-04. There is no hint in the

history of the 1986 Amendments Act that Congress intended to disqualify organizational relators.[13] To the contrary, any such rule would have disqualified the State of Wisconsin from proceeding as relator in *Dean* and so would defeat one of the announced motivations behind the 1986 Amendments Act. Though organizations must, of course, act through agents, this does not render their knowledge parasitical or their agency "intervening" in the sense of interrupting the causal connection between the corporation's efforts and the knowledge. *See Black's Law Dictionary* 212 (7th ed. 1999) ("intervening cause" or "intervening agency" is "An event that comes between the initial event in a sequence and the end result, thereby altering the natural course of events that might have connected a wrongful act to an injury").

In further contrast to the corporate relators in *Precision Co.* and *Federal Recovery Services,* the Association is an unincorporated association. Unlike a corporation, a voluntary unincorporated association has no legal status separate from its members. *See St. Paul Typothetae v. St. Paul Bookbinders' Union,* 102 N.W. 725 (Minn.1905) ("Such [unincorporated] societies, in the absence of statutes recognizing them, have no legal entity distinct from that of their members."). By statute Minnesota altered the common law to permit persons associated under a common name to sue under that name, Minn.Stat. Ann. § 540.151 (2000), but this statute is only procedural. Unincorporated associations derive their rights from the rights of their

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[13] If Congress had harbored some hostility to organizational relators, it would have been odd to disqualify them only in the event that their claims were publicly disclosed before they filed suit, but that would be the effect of the interpretation defendants propose.

members. *See Federal Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 121 S.Ct. 2351, 2362 n.10 (2001) (First Amendment rights). Thus, associations can have standing to assert their members' rights in court, *see United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551-53 (1996), whereas a corporation has no standing to assert rights belonging to its shareholders, *Waseca Co. Bank v. McKenna*, 21 N.W. 566 (Minn. 1884). An association's knowledge is in no way parasitic of its members and is "direct" within the meaning of the original source clause.

In this case, the Association pleaded that its members have "personal knowledge that defendant anesthesiologists have routinely billed Medicare for personal performance of anesthesia procedures in which they were *not* continuously involved or present." It further pleaded that its members "have personal knowledge of defendants' false claims by virtue of communications with defendants themselves, participation in the anesthesia procedures which were later fraudulently billed by the defendant anesthesiologist, and familiarity with hospital records disclosing defendants' fraud." The defendants' response is that the anesthetists did not have direct knowledge of the anesthesiologists' billing practices, which came to light in an audit.

There are two problems with the defendants' argument. First, the record shows that the anesthetists often did see the anesthesiologist filling out forms used for billing with misleading information. These observations would support an inference that the anesthesiologist submitted false bills.

Second, to qualify as an original source, a relator does not have to have personal knowledge of all elements of a cause of action. *Springfield Term. Ry.,* 14 F.3d at 656-67. Direct knowledge of the anesthesiologists' operating room practices would be enough. A false claim consists of a representation contrary to fact, made knowingly or recklessly. If the relator has direct knowledge of the true state of the facts, it can be an original source even though its knowledge of the misrepresentation is not first-hand. *Id.* We therefore conclude that the Association has not only independent, but also direct knowledge of the information in question within the meaning of section 3730(e)(4)(B).

The last statutory condition for qualifying as an original source is that the relator must have voluntarily provided the information to the government before filing suit. The defendants concede that the Association sent a copy of its antitrust complaint to the local Medicare Part B office several days after it filed the antitrust suit. The Association's attorney filed an affidavit saying he received a call from a Medicare representative within a few days after mailing the complaint. The representative said he was referring the complaint to the Justice Department. We conclude that the Association fulfilled the requirement that it provide the information to the government before filing suit.

The defendants urge us to adopt an additional requirement that the relator must have revealed the allegations to the government *before* the public disclosure in order to be an original source. This rule has been adopted by the District of Columbia and Sixth Circuits. *FPC-Boron Employees' Club,* 105 F.3d at 690-91; *McKenzie,* 123 F.3d at 943. This additional requirement has no textual basis in the statute. Moreover, the courts adopting this requirement

have justified it by arguing that after public disclosure, the relator has no utility to the government. *FPC-Boron Employees' Club,* 105 F.3d at 691 ("Once the information has been publicly disclosed, however, there is little need for the incentive provided by a qui tam action."). However, as we have seen, through the original source provisions Congress chose to reward persons who discovered and revealed fraud, rather than confiscating their claims. At the same time, Congress limited that beneficence by denying the bounty even to those who uncovered the fraud unless they had revealed it to the government before filing suit. Sec. 3730(e)(4)(B). We would change the balance Congress struck if we were to further restrict the class of those whose discoveries had been made public but who were nevertheless permitted to proceed as relators. We decline to adopt the proposed additional requirement.

We hold that the Association qualifies as an original source of the information on which its allegations are based. We have subject-matter jurisdiction over this case.

III.

The district court held that the Association lacked standing to pursue the qui tam claim because there was no pecuniary injury to the United States when the anesthesiologists allegedly billed for medically directing or personally performing cases without fulfilling the requirements for medical direction or personal performance. The district court went beyond the pleadings to examine the evidence on the injury issue. We therefore review this issue under the summary judgment standard, rather than limiting our inquiry to the pleadings. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992).

We review the district court's entry of summary judgment de novo, applying the same standard appropriate in the district court. *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999). Summary judgment is proper only if, taking the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

After the date of the district court's decision, the Supreme Court decided *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 778, (2000), in which it held that "a *qui tam* relator under the [False Claims Act] has Article III standing." The Court identified two discrete injuries to the United States that are redressed through False Claims cases: "both the injury to its sovereignty arising from violation of its laws (which suffices to support a criminal lawsuit by the Government) and the proprietary injury resulting from the alleged fraud." *Id.* at 771. The Court held that a qui tam relator gained standing to assert the government's rights through a "partial assignment of the Government's damages claim." *Id.* at 773. The defendants contend that if there are no damages, a qui tam relator does not have standing to assert the government's claim for penalties. The United States, appearing as amicus, contends that the relator can pursue such a claim. We have no occasion to address this argument, since the district court erred in holding that the United States would have suffered no pecuniary injury even if the Association proved false claims. That holding was based on a misunderstanding of the payment rules.

The Association alleges that the anesthesiologists billed for medical direction in cases in which they fell short of the requirements for that designation. The district court

concluded that if the anesthesiologists had not billed these cases as medical direction, "[p]resumably" they could only have billed them as personally performed, which would have been even more expensive. This does not follow. The services of an anesthesiologist who was involved in some way with a case but failed to meet the requirements of personal performance or medical supervision were not reimbursable on a reasonable charge basis under Medicare as services to the patient. Instead, the anesthesiologist's services would be considered supervisory services furnished to the hospital, reimbursable to the hospital on a reasonable cost basis only. 42 C.F.R. § 405.552(b) (1983); 48 Fed. Reg. 8902, 8927 (March 2, 1983). The defendants contend that if the anesthesiologists were not billed as performing or directing the cases, the government would have had to pay the anesthetists for the same service and therefore there would have been no net loss to the government. Before 1989, anesthetists were not eligible for reasonable charge reimbursements for anesthesia services. 48 Fed. Reg. at 8927. After January 1, 1989, Medicare reimbursed for anesthetists' services, but at least for some of that time it paid a lower rate than it paid for anesthesiologists' anesthesia services. United States General Accounting Office Report to Congressional Committees, *Medicare Payments for Medically Directed Anesthesia Services Should Be Reduced* 24-27 (March 1992). The Association filed an affidavit asserting that anesthetists were paid less than anesthesiologists for performing cases personally during much of the relevant time period. Therefore, it is incorrect to conclude that the government would have paid the same for the services no matter whether they were billed as personally performed by an anesthesiologist or not. Additionally, the Association claims that in some cases the hospitals certified that it

was medically necessary for both an anesthesiologist and anesthetist to perform anesthesia on a single patient, with no concurrent cases, when in fact the anesthesiologist did not personally perform the case. In such cases, if the government paid the personal performance rate to both the anesthetist and the anesthesiologist, the government's cost would be doubled. These sorts of pecuniary injury plainly confer standing on the relator who alleges them. The district court's legal conclusion that the Association lacked standing was premised on a faulty understanding of the applicable regulations.

IV.

The Association also appeals the district court's entry of summary judgment against it on the merits of its suit.

The district court entered summary judgment against the Association on the merits of its claims to the extent the claims were based on anesthesiologists billing cases as "personally performed." The district court held that Medicare regulations in effect at the time in question were "susceptible" to the interpretation that an anesthesiologist need not have been continuously physically present in the operating room to bill a case as "personally performed." The court concluded that this ambiguity ruled out the possibility that the defendants knew they were presenting false claims when they billed for personal performance of the cases in which they were not continuously present.

The United States has filed an amicus brief taking strong exception to the proposition that one cannot make a false statement by verifying compliance with an ambiguous regulation so long as one's actions satisfied any possible interpretation of the regulation. The government's

argument finds support in the Ninth Circuit's recent case of *United States ex rel. Oliver v. Parsons Co.,* 195 F.3d 457, 460, 463 (9th Cir. 1999) (court's interpretation of ambiguous regulation determines whether claim of compliance with regulation was false), *cert. denied,* 530 U.S. 1228 (2000). The defendants fall back from this position, arguing that the district court "did not . . . hold that the ambiguity of the anesthesia regulations negated a finding of falsity." Instead, the defendants contend the district court held that "many considerations precluded a finding of intent."

The False Claims Act prohibits the *knowing* presentation of false claims for government payment or approval. 31 U.S.C. § 3729(a). The Act defines "knowing" and "knowingly" to mean that the actor had actual knowledge of the pertinent information or acted in deliberate ignorance or in reckless disregard of the truth or falsity of that information. Sec. 3729(b). The question on intent here is whether the defendants knew (or would have known absent deliberate blindness or reckless disregard) that their bills would lead the government to believe that they had provided services that they actually did not provide. If a statement alleged to be false is ambiguous, the government (or here, the relator) must establish the defendant's knowledge of the falsity of the statement, which it can do by introducing evidence of how the statement would have been understood in context. *See United States v. Garfinkel,* 29 F.3d 1253, 1256 (8th Cir. 1994) ("evidence offered at trial could potentially resolve any ambiguity on the face of the document"); *United States v. Anderson,* 579 F.2d 455, 460 (8th Cir. 1978) ("In light of these ambiguities . . . the government must negative any reasonable interpretation that would make the defendant's statement factually

correct."); *United States v. Mackby,* 261 F.3d 821, 827 (9th Cir. 2001) (False Claims Act violation consisted of filling in Medicare claim form contrary to instructions received in Medicare bulletins). If the Association shows the defendants certified compliance with the regulation knowing that the HCFA interpreted the regulations in a certain way and that their actions did not satisfy the requirements of the regulation as the HCFA interpreted it, any possible ambiguity of the regulations is water under the bridge. However, it is important to remember that the standard for liability is knowing, not negligent, presentation of a false claim. *Oliver,* 195 F.3d at 464-65.

The alleged ambiguity is limited to the meaning of the requirement in the 1992 regulation 42 C.F.R. § 414.46(c)(2)(ii), that an anesthesiologist must be "continuously involved" in a case in order to have personally performed an anesthesia case in which an anesthetist was also "involved." The defendants contend that there was confusion about what was required of an anesthesiologist in order to bill a case as personally performed or "AA." The record shows that up until September 1993, while there may have been some uncertainty about the interpretation of "continuously involved," the defendants were on notice of the possibility that they were expected to be present with the anesthetist in order to represent that they had personally performed a case. There is at least a question of fact as to their state of mind during this early period. During this time frame, defendant Allina's in-house lawyer advised that it was his understanding that an anesthesiologist had to be "continuously present" with the anesthetist to bill for personal performance. The same lawyer inquired of Travelers, the Medicare carrier for the Twin Cities area, whether an anesthesiologist had to be in the

operating room the whole time to bill a single case as personally performed. Travelers agreed to get an answer from HCFA to this question. The defendants contend that they considered this question settled by an HCFA memo, which Travelers relayed to its provider community in September 1993, and which Blue Cross, carrier for the St. Cloud area, relayed to its providers in April 1994. The memo stated:

> It has been reported that anesthesiologists will bill using the AA modifier even though they are outside the operating room performing other activities, such as pain blocks, doing pre or post operative evaluations, or administering and/or monitoring a labor epidural. For the anesthesiologist to bill using the AA modifier [for personally performed case] under these circumstances, he must be physically present in the operating suite while the [anesthetist] is attending to the case. If the anesthesiologist is not continuously involved with the case, then it is considered neither personally performed nor medically directed.

(emphasis added). The defendants introduced evidence that at least some of them relied on this memo in forming the belief that they could bill for personally performing cases despite leaving the operating room, so long as they were present in the operating suite, which they define as the area in the hospital where surgery takes place.

In response, the Association contends that it was not reasonable to read this memo as authorizing anesthesiologists to bill for personal performance when they were not in the room with the patient. The Association argues that the 1993 HCFA memorandum was not intended to authorize anesthesiologists to leave while an anesthetist

performed their one-on-one cases, so long as they stayed in the operating suite. Instead, as the HCFA pointed out in April 1996, the intended point of the 1993 memorandum was to emphasize that, whoever physically performed the work in a one-on-one case, the anesthesiologist had to be solely devoted to that case in order to bill it as personally performed. The 1996 HCFA memo reasoned: "It should be assumed that, if the physician leaves the operating room, he/she is performing other duties. If the physician leaves the operating room to perform any other duties, the anesthesia procedure may not be billed as personally performed."

A few months after Travelers' dissemination of the 1993 HCFA memorandum, a further memorandum from HCFA on the subject of personally performed procedures was published in the American Society of Anesthesiologists newsletter of April 1994. This memorandum made it clear that anesthesiologists were not to leave a patient during a personally performed procedure. The memo stated that an anesthesiologist performing *medical direction* of concurrent procedures could "momentarily leave that procedure and perform another physician service" so long as this did not occur during a demanding part of the procedure. The memo contrasted the requirements for medically directed procedures with those for *personally performed* procedures: "Of course, we have not extended this policy to the case in which the anesthesiologist is personally performing the case. The reason for this is rather obvious. The anesthesiologist who is billing for personal performance of the case must personally perform the case. In theory, there is no one else to hand the case to." The memo concluded by saying that if the anesthetist, rather than

the anesthesiologist was actually performing the case, then the anesthetist, rather than the anesthesiologist, should be paid for it. Thus, the time frame within which the 1993 HCFA memorandum could have been thought to have given the anesthesiologists permission to bill cases as personally performed when they were not immediately involved in the procedure was quite brief.

Even assuming that, for six months or so, the 1993 HCFA memorandum misled some defendants into believing that anesthesiologists could leave the operating room and still represent that they had personally performed the case, this would only rule out claims in which leaving the operating room was the only respect in which the anesthesiologist fell short of fulfilling the personal performance standard. The Association amassed a record that would support the conclusion that the anesthesiologists regularly fell short of the standard in other respects.

First, whether or not the anesthesiologists disqualified themselves per se from billing at the personal performance rate by absenting themselves from the operating room, various anesthetists testified by deposition and affidavit that the anesthesiologists did not merely step out of the room, but in fact were often gone for large periods of time and at crucial times.[14] For instance, anesthetist Drew

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[14] The Association's brief makes numerous general citations to vast tracts of the record, sometimes as much as three hundred pages to support a single assertion. Rule 28(e) of the Federal Rules of Appellate Procedure requires page references to the appendix or parts of the record or transcript to support factual assertions. We have in the past criticized counsel for violating this rule and have even refused to consider arguments not supported by proper citations. *E.g., Miller v. Citizens Security Group, Inc.*, 116 F.3d 343, 346 n.4 (8th Cir. 1997). We consider burying a needle in a haystack to amount to a violation of Rule

(Continued on following page)

Mathews testified that in heart operations billed as personally performed, for over ninety percent of the cases he worked on, the anesthesiologist was present less than fifty percent of the time. Mathews kept extensive records of anesthesiologists' presence during the cases he worked on. Genevieve Crofoot testified that in one-on-one cases, the anesthesiologists would perform the induction and never come back. Kathleen Antoline also said that the anesthesiologists "circled 1 [denoting personally performed] and that was the end of their participation directly with that patient with me."

Second, the Association's witnesses stated that the anesthesiologists billed as personally performing cases when they were unavailable for emergencies on the case. Sometimes they were in a completely different part of the hospital during the case or even left the hospital. Mary Buchanan said anesthesiologists would circle one but would be unavailable for emergencies or would even leave the building. Kathleen Antoline said that a quarter of the time when she paged for emergencies, no one would come. Bart Barry testified that he had a case in which the anesthesiologist billed one-to-one despite being gone for three hours; when he returned, he had a blanket and appeared to have just woken up. Barry said that when someone is sleeping, the person may not hear a page. One anesthesiologist, John Magdsick, testified that he would consider himself in personal attendance of a patient as long as he was anywhere in the hospital. Nothing in the

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28. In this case we conclude that the interest of justice requires us to search the record to make appropriate rulings; however, counsel's violation of Rule 28 has multiplied the effort and prolonged the time necessary to prepare this opinion.

HCFA memorandum could have led the defendants to think that they could bill a case as personally performed when they were not present in the operating suite or when they were not available for emergencies in the case.

Third, many of the cases cited in the complaint involved anesthesiologists billing for personal performance while doing other duties inconsistent with personal performance, such as billing a concurrent case. Gayle McKay testified that anesthesiologists at Abbott-Northwestern would routinely bill cases as personally performed when they had left the room to do other billable procedures with other patients. Other times, they would leave to do post-operative rounds. The Association also filed copies of records it contends were altered to conceal the fact that a case done concurrently with another was actually billed as personally performed. Additionally, the evidence of the anesthesiologists' protracted absences from the operating rooms may give rise to the reasonable inference that the anesthesiologists were actually engaged in other duties while they were gone from the room. The 1996 HCFA memo on this subject assumes that significant absence from the room during the surgery would indicate performance of other duties that would render personal performance billing inappropriate.

Defendants have certainly made no showing that they were led to believe that the kind of conduct outlined above qualified as the personal performance of an anesthesia case. They were not entitled to summary judgment on the allegations that they knowingly billed cases as personally performed when their services did not satisfy HCFA criteria for that designation.

V.

The district court also entered summary judgment on the merits of the Association's claim that the anesthesiologists failed to participate in patients' "emergence" from anesthesia. As outlined earlier, the Medicare regulations required that anesthesiologists billing for "medical direction" of anesthetists must satisfy seven requirements in each case. One of those requirements was personal participation in "the most demanding procedures in the anesthesia plan, including induction and emergence." 42 C.F.R. § 405.552(a)(1)(iii) (1983).

The Association produced witness after witness who said that the anesthesiologists at the hospitals where they worked routinely left after induction of anesthesia and did not return for emergence. The district court summarized this evidence: "[T]he record shows that anesthesiologists routinely left the operating room before the end of the procedure, often speaking with patients in the recovery room or by telephone hours or even days after their procedures."

The Association's witnesses said that emergence occurs at the end of the surgery, in the operating room, and involves removing the breathing tube, allowing the patient to wake up, determining that the patient is stable, and finally taking the patient to the recovery room and relinquishing him to the care of a non-anesthesia caregiver. The Association produced letters from the American Society of Anesthesiologists and an excerpt from an anesthesia textbook, which were all consistent with this definition of emergence. The Association also presented the expert report of William Birnie, who worked for the HCFA when it was drafting the regulations in question.

Birnie testified that the regulations were based on advice from the American Society of Anesthesiologists that emergence was a particularly demanding part of the anesthesia process and it occured at "the end of the case when the surgical procedure has been completed and the patient is being prepared by the anesthesiologist to be turned over to a non-anesthesia provider."

Despite this extensive record, the district court held that "the overwhelming majority of the evidence on the record relating to the medical definition of [emergence]" supports the defendants' contention that emergence goes on for days. Therefore, according to the district court, the anesthesiologists did not need to participate in the extubation, stabilization, and transfer to the recovery room in order to fulfill the requirements of medical direction. Apparently the district court chose to disregard a record full of evidence contrary to its factual conclusion. This is impermissible on summary judgment, and we must therefore reverse.

VI.

The district court also entered summary judgment against the Association on its conspiracy claim, holding that there was no evidence that the anesthesiologists and hospitals had conspired to present false claims. We agree. The Association limits its attack on this holding to a footnote, and it presents no significant evidence for reversal. Accordingly, the judgment of the district court is reversed, except insofar as it enters summary judgment for the defendants on Count III of the Third Amended Complaint, alleging conspiracy, and on that part of Count

V alleging conspiracy. In those two respects, the summary judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

United States of America, *ex rel.* Minnesota Association of Nurse Anesthetists,

Plaintiff,

v.

Allina Health System Corp., Unity Hospital, Mercy Hospital, John Murphy, Midwest Anesthesiologists, P.A., Metropolitan Anesthesia Network, Allen Tank, Health Billing Systems, Inc., Thelma M. Albay, M.D., Gary Baggenstoss, M.D., Minda Castillejos, M.D., David Cumming, M.D., Teri Heil, M.D., Sang Hong, M.D., Ted Janossy, M.D., Raymond Kloepper, II, M.D., John Magdsick, M.D., Thomas Maggs, M.D., Thomas Polta, M.D., John Roseberg, M.D., Jai Suh, M.D., Mark Sperry, M.D., Jeffrey Yue, M.D., and John Rydberg M.D., St. Cloud Hospital, Anesthesia Associates of St. Cloud Ltd., Gary A. Boeke, M.D., Philip F. Boyle, M.D., L. Michael Espeland, M.D., Alan D. Espelien, M.D., Paul J. Halverson, M.D., Craig Johnson, M.D., Lanse C. Lang, M.D., A. Wade McMillan, M.D., William H. Rice, M.D., Allan Reitz, M.D.,

ORDER
Civil No. 4-96-734

(Filed Sep. 24, 1997)

Annette E. Zwick, M.D., Anesthesiology, P.A., Abbott Northwestern Hospital, Northwest Anesthesia, P.A., Bryce Beverlin, M.D., Richard Blomberg, M.D., Jean Boening, M.D., Mitchell Burke, M.D., Rajarao Dwarakanath, M.D., Richard Engwall, M.D., James Gayes, M.D., Luis Giron, M.D., Nancy Groves, M.D., Jonathan Gudman, M.D., Richard Johnson, M.D., John Lillehei, M.D., Robert McKlveen, M.D., Judith Meisner, M.D., Michael Menzel, M.D., James Musich, M.D., Mark Nissen, M.D., Xavier Pereira, M.D., David Plut, M.D., Jeffrey Shaw, M.D., Richard Skoog, M.D., William Stauffer, M.D., Ofelio Tiu, M.D., Robert Tronnier, M.D., John Wintermute, M.D., and [other unknown defendants], Does I through XX,

Defendants.

INTRODUCTION

The above-entitled matter is before the undersigned United States District Judge on Defendants' motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b). The matter initially came on for hearing before this Court on November 8, 1996 pursuant to Defendants' motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), failure to plead fraud with particularity under Rule 9(b), and failure to state a claim upon which relief may be granted under Rule 12(b)(6).

On March 3, 1997, this Court denied Defendants' motion to dismiss for lack of subject matter jurisdiction. The Court also denied without prejudice Defendants' motion to dismiss for failure to state a claim upon which relief may be granted. The Court, however, granted Plaintiffs leave to file an amended complaint.

After Plaintiffs filed their third amended complaint, the matter again came on for hearing before the undersigned Judge on July 16, 1997, pursuant to Defendants' motion to dismiss or, in the alternative, to certify this Court's jurisdictional decision for interlocutory appeal to the United States Court of Appeals for the Eighth Circuit. Although this Court certified its Order for interlocutory appeal in the interests of judicial economy, the Eighth Circuit declined to review the decision on August 29, 1997. As a result, Defendants' motions to dismiss are once again before this Court.

BACKGROUND

The Court's Order of March 3, 1997 provides a detailed description of the parties, the procedural history and the relevant facts involved in this case. To avoid redundancy, the Court incorporates those facts by reference.

DISCUSSION

I. Standard for a Motion to Dismiss

In considering a motion to dismiss, the pleadings are construed in a light most favorable to the nonmovant, and the facts alleged in the complaint must be taken as true. *Hamm v. Groose*, 15 F.3d 110, 112 (8th Cir. 1994); *Ossman*

v. Diana Corp., 825 F. Supp. 870, 879-80 (D. Minn. 1993). Any ambiguities concerning the sufficiency of the claims must be resolved in favor of the nonmovant. *Ossman*, 825 F. Supp. at 880. A complaint should be dismissed "only if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations." *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995) (citations omitted); *Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996). "A motion to dismiss should be granted as a practical matter . . . only in the unusual case in which the nonmovant includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Frey*, 44 F.3d at 671.

II. General Requirements of Rule 9(b)

Defendants maintain the Plaintiffs' complaint should be dismissed because it fails to allege fraud with sufficient particularity to satisfy Rule 9(b). Federal Rule of Civil Procedure 9(b) provides that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." The purpose of the rule is threefold: "(1) to inhibit the filing of a complaint as a pretext for discovery of unknown wrongs; (2) to protect defendants from the harm that results from charges of serious wrongdoing; and (3) to give defendants notice of the conduct complained of, enabling defendants to prepare a defense." *United States v. Napco Int'l, Inc.*, 835 F. Supp. 493, 495 (D. Minn. 1993) (citing *Coronet Ins. Co. v. Seyfarth*, 665 F. Supp. 661, 66 (N.D. Ill. 1987)).

Courts have recognized, however, that the pleading requirement under Rule 9(b) may be relaxed if the defendant controls information required for proper pleading. *U.S. ex rel. Stinson, Lyons v. Blue Cross*, 755 F. Supp. 1055, 1056 (S.D. Ga. 1990); *U.S. ex rel. Sanders v. East Alabama Healthcare Authority*, 953 F. Supp. 1404, 1413 (M.D. Alabama 1996). In addition, courts will require less specificity in the complaint if the fraudulent activity involves numerous transactions or the fraud occurred over a long period of time. *Terrell v. Childers*, 836 F. Supp. 468, 475 (N.D. Ill. 1993).

Rule 9(b) applies to alleged violations of the False Claims Act. *United States v. Napco Int'l, Inc.*, 835 F. Supp. at 945. The False Claims Act provides, in relevant part:

> Any person who –
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes uses, or causes to be made or used, a false or fraudulent claim paid or approved by the Government;
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; or . . .
>
> (7) knowingly makes, uses or causes to be made, or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

> is liable to the United States Government for a civil penalty. . . .

31 U.S.C. § 3729(a)(1)-(3), (7).

(1) Counts I, II, and III

a) Rule 9(b) Pleading Requirements

As to counts I and II, Plaintiffs' third amended complaint provides a plethora of examples of allegedly fraudulent conduct by individual defendants including names, dates, and descriptions of procedures. These allegations are sufficiently particular to satisfy the pleading requirements under Rule 9(b).

In circumstances in which the plaintiff has limited access to information, courts have afforded plaintiffs more flexibility under Rule 9(b). *See, e.g., U.S. ex rel. Stinson, Lyons v. Blue Cross*, 755 F. Supp. at 1056. With respect to the hospital Defendants, Plaintiffs provide fewer examples to support counts I and II. In almost all cases, however, the examples provide specific information including names, dates, and descriptions of procedures. Plaintiffs maintain that they cannot provide more specific allegations regarding St. Cloud Hospital, because the detailed information is exclusively in Defendant St. Cloud Hospital's possession. Plaintiffs assert that they have knowledge of fraudulent billing practices at all of the Defendant hospitals including Defendant St. Cloud Hospital. Despite the absence of specific examples at St. Cloud Hospital, Plaintiffs provide an adequate description of the nature and subject matter of the alleged false claims. Plaintiffs have provided notice sufficient to allow Defendants to defend against the allegations. As such, Plaintiffs have satisfied the pleading requirements of Rule 9(b) with respect to all Defendants. *See United States, ex rel. Piacentile v.*

Wolk, 1995 WL 20833 at *4 (E.D. Pa. 1995) ("Where the allegations describe the nature and subject matter of the alleged misrepresentations, the requirements of 9(b) are satisfied").

As noted above, courts have recognized a more relaxed exception to the particularity requirements of Rule 9(b) when the necessary information is in the exclusive control of defendants. In light of this exception, the Court finds that Plaintiffs have also minimally satisfied the pleading requirements as to count III, which alleges a conspiracy to defraud the government in violation of § 3729(a)(3). It should be noted, however, that Plaintiffs will face a substantially greater burden to withstand a summary judgment motion as to count III.

Furthermore, the Court rejects Defendants' assertion that Plaintiffs' complaint should be dismissed because it relies exclusively on information gathered through the discovery process. Defendants rely on, *inter alia*, *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia*, 755 F. Supp. 1040, 1053 (S.D. Ga. 1990), for the proposition that "a complaint alleging fraud should be filed only after a wrong is *reasonably* believed to have occurred; it should seek redress for a wrong, not to find one." In its March Order, however, this Court acknowledged that Plaintiffs' allegations were based upon their own knowledge. Although Plaintiffs amended their complaint in an effort to plead with sufficient particularity, the basis of the complaint continues to be Plaintiffs' knowledge and reasonable belief.

b) Rule 12(b)(6)

In addition to their Rule 9(b) assertions, Defendants contend that Plaintiffs' complaint fails to state a claim upon which relief can be granted under Rule 12(b)(6). Defendant hospitals assert that Plaintiffs have failed to allege a violation of the False Claims Act. In support of this contention, Defendant hospitals maintain that Plaintiffs' claim is legally insufficient because it fails to show that Defendant hospitals violated 31 U.S.C. § 2729(a)(1), (2), or (3). Defendants assert that Plaintiffs' allegations even if true, would not constitute a violation of the False Claims Act. Defendant hospitals maintain that "facilitating" fraud, as Plaintiffs have alleged in this case, is not actionable conduct within the meaning of the Act. It is conceivable, however, that "facilitation" could "cause to be presented . . . a false or fraudulent claim" under § 3729(a)(1). Similarly, "facilitation" could implicate the Defendant hospitals under §§ 3729(a)(2) or (3). As such, plaintiffs' claims against Defendant hospitals are legally sufficient under Rule 12(b)(6) and excluding them on a motion to dismiss would be premature.

As discussed above, Plaintiffs' allegations regarding the individual Defendants satisfy the particularity requirements of Rule 9(b). Additionally, with respect to counts I, II, and III, the Court finds no other "insuperable bar to relief" regarding the alleged violations of individual Defendants. *See, e.g., Frey*, 44 F.3d at 671. Accordingly, the individual Defendants' motions to dismiss will be denied as to counts I, II, and III.

(2) Count IV

Defendants assert that count IV should be dismissed for failure to state a claim upon which relief may be granted under Rule 12(b)(6). Count IV of Plaintiffs' complaint alleges that Defendants violated 31 U.S.C. § 3729(a)(7), which makes it a crime to "knowingly make[s], use[s], or cause[s] to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government. . . ." Defendants maintain that Plaintiffs' complaint does not allege facts that suggest Defendants' were concealing, avoiding, or decreasing a payment obligation. Plaintiffs argue that Defendants' alleged pattern of continually submitting false claims was, in part, intended as a method to avoid an obligation to repay the Government for the same purportedly fraudulent submissions. Plaintiffs assert that each alleged submission of a false claim constitutes both a false claim for payment, in violation of § 3729(a)(1) and (2), and a claim for wrongful avoidance of (re)payment to the government, in violation of § 3729(a)(7).

The "plain meaning" of subsection (a)(7) does not support Plaintiffs' interpretation. Courts have characterized claims under (a)(7) as "reverse false claims." *Wilkins ex rel. United States v. State of Ohio*, 885 F. Supp. 1055, 1064 (S.D. Ohio 1995). In essence, Plaintiffs allege that Defendants simultaneously submitted a false claim and a "reverse false claim" through the same action. Defendants should not be liable for the submission of an allegedly false claim *and* for the receipt of the government's payment of the same allegedly false claim. This interpretation subjects Defendants to a gratuitous penalty for the same allegedly improper act. Nothing in Plaintiffs' complaint

suggests an independent basis for liability under subsection (a)(7). The alleged conduct of Defendants is within the purview of subsections (a)(1) and (2) rather than (7). Accordingly, count IV will be dismissed with respect to all Defendants.

(3) Count V

In count V, Plaintiffs allege that Defendant hospitals violated their provider agreements with Medicare and conspired with Defendant anesthesiologists to submit false claims to the government. Plaintiffs apparently allege that Defendant hospitals breached their contract with Medicare. Count V, which is articulated in vague terms, does not allege a violation of the False Claims Act, and no relief is requested under count V. Because count V does not include an alleged violation of the False Claims Act, Plaintiff lacks standing to assert a valid claim for breach of an agreement between the government and the Defendant hospitals. *See United States ex rel. Mayman v. Martin Marietta Corp.*, 894 F. Supp. 218, 225-26 (D.Md. 1995) (qui tam realtor's standing and recovery is limited to claims under the False Claims Act). Consequently, count V of Plaintiffs' complaint will be dismissed with prejudice as to all Defendants.

CONCLUSION

Based on the foregoing, and all of the files, records and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendants' motions to dismiss counts I, II, and III are **DENIED**.

2. Defendants' motions to dismiss counts IV and V are **GRANTED**; counts IV and V are accordingly **DISMISSED WITH PREJUDICE**.

/s/ Ann D. Montgomery
Ann D. Montgomery
UNITED STATES DISTRICT JUDGE

Dated: 9/24/97

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America, *ex rel.*, Minnesota Association of Nurse Anesthetists,

Plaintiff,

v.

Allina Health System Corp., Unity Hospital, Mercy Hospital, John Murphy, Midwest Anesthesiologists, P.A., Metropolitan Anesthesia Network, Allen Tank, Health Billing Systems, Inc., Thelma M. Albay, M.D., Gary Baggenstoss, M.D., Minda Castillejos, M.D., David Cumming, M.D., Teri Heil, M.D., Sang Hong, M.D., Ted Janossy, M.D., Raymond Kloepper, II, M.D., John Magdsick, M.D., Thomas Maggs, M.D., Thomas Polta, M.D., John Roseberg, M.D., Jai Suh, M.D., Mark Sperry, M.D., Jeffrey Yue, M.D., John Rydberg M.D., St. Cloud Hospital, Anesthesia Associates of St. Cloud Ltd., Gary A. Boeke, M.D., Philip F. Boyle, M.D., L. Michael Espeland, M.D., Alan D. Espelien, M.D., Paul J. Halverson, M.D., Craig Johnson, M.D., Lanse C.

MEMORANDUM OPINION AND ORDER

Civil No. 4-96-734 ADM/AJB

(Filed March 17, 1999)

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Abbott Northwestern
Hospital, Northwest
Anesthesia, P.A., Bryce
Beverlin, M.D., Richard
Blomberg, M.D., Jean
Boening, M.D., Mitchell
Burke, M.D., Rajarano
Dwarakanath, M.D., Richard
Engwall, M.D., James Gayes,
M.D., Luis Giron, M.D.,
Nancy Groves, M.D.,
Jonathan Gudman, M.D.,
Richard Johnson, M.D., John
Lillehei, M.D., Robert
McKlveen, M.D., Judith
Meisner, M.D., Michael
Menzel, M.D., James Musich,
M.D., Mark Nissen, M.D.,
Xavier Pereira, M.D., David
Plut, M.D., Jeffrey Shaw,
M.D., Richard Skoog, M.D.,
William Stauffer, M.D.,
Ofelio Tiu, M.D., Robert
Tronnier, M.D., John
Wintermute, M.D., and
[other unknown defendants],
Does I through XX,

Defendants.

William S. Rosen, Rosen & Rosen, St. Paul, Minnesota;
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and Herbert J. Stern, Stern & Greenberg, attorneys for Plaintiffs.

Bradley G. Clary and David P. Graham, Oppenheimer, Wolff & Donnelly, Minneapolis, Minnesota, attorneys for Defendant Anesthesiology, P.A.

Thomas Fraser, Cynthia Jokela, and Laurie J. Miller, Fredrickson & Byron, P.A., Minneapolis, Minnesota, attorneys for Defendants Midwest Anesthesia, P.A., et al.

Kevin J. Hughes and Paul R., Hughes, Mathews & Didier, P.A., St. Cloud, Minnesota, attorneys for Defendant St. Cloud Hospital.

John D. French, Jay D. Christiansen, Richard A. Duncan, and Elizabeth Schmiesing, Faegre & Benson, Minneapolis, Minnesota, attorneys for Defendants Allina Health System Corp., Unity Hospital, Mercy Hospital, Abbott Northwestern Hospital, and John Murphy.

Charles N. Nauen and Eric Tostrud, Lockridge, Grindal, Nauen & Holstein, PLLP, Minneapolis, Minnesota, attorneys for Defendants Anesthesia Associates of St. Cloud, Ltd., et al.

John A. Cotter and Christopher K. Larus, Larkin, Hoffman, Daly & Lindgren, Ltd., Bloomington, Minnesota, attorneys for Northwest Anesthesia, P.A., et al.

Janice M. Symchych and Christopher T. Shaheen, Dorsey & Whitney, L.L.P., Minneapolis, Minnesota, attorneys for Defendants Allen Tank and Health Billing Systems, Inc.

I. INTRODUCTION

The above-entitled matter came on for hearing before the undersigned United States District Judge on December 8, 1998 pursuant to Defendants' Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment. For the reasons set forth below, Defendants' motion is granted; Plaintiff's motion is denied; and Plaintiff's claims are dismissed.

II. BACKGROUND

A. Parties

1. Plaintiff

Plaintiff, the Minnesota Association of Nurse Anesthetists ("MANA") is a Minnesota-based trade association of Certified Registered Nurse Anesthetists ("CRNAs"). *See* Pl. Second Amended Complaint, at ¶ 3. The Association was formed to promote and protect the interests of its members. *Id.*

2. Defendants

Defendants are comprised of various hospitals, administrators, anesthesiology practice groups, and medical doctor anesthesiologists. Defendants have been divided into six groups:

1. The "Allina" Defendants, comprised of: Allina, which is an integrated health care system; Unity and Mercy Hospital; and John Murphy, Vice President of Unity and Mercy Hospitals. *Id.* at ¶¶ 7-10.

2. The "Midwest Anesthesiologists, P.A." ("MAPA") Defendants, comprised of: MAPA, a professional association which provides anesthesia services to Unity and Mercy Hospitals, Metropolitan Anesthesia Network; Allen Tank, a business manager with MAPA; Health Billing Systems, a billing service for MAPA employees; and several doctor anesthesiologists who maintain privileges at Unity and/or Mercy Hospitals and who are members of MAPA – Thelma Albay; Gary Baggenstoss; Minda Castillejos; David Cumming; Teri Heil; Sang Hong; Ted Janossy; Raymond Kloepper; John Magdsick; Thomas Maggs; Thomas Polta; John Roseberg; Jai Suh; Mark Sperry; Jeffrey Yue; and John Rydberg. *Id.* at ¶¶ 11-16.

3. Defendant St. Cloud Hospital. *Id.* at ¶ 17.

4. The "St. Cloud Anesthesiologist" Defendants, comprised of: Anesthesia Associates of St. Cloud, a professional partnership whose anesthesiologist members maintain privileges at St. Cloud Hospital; and the doctor anesthesiologists of Anesthesia Associates – Gary Boeke; Philip Boyle; L. Michael Espeland; Alan Espelien; Paul Halverson; Craig Johnson; Lanse Lang; A. Wade McMillan; William Rice; Allan Reitz; and Annette Zwick. *Id.* at ¶¶ 18-19.

5. Defendant Anesthesiology, P.A., a professional association which provides anesthesia services. *Id.* at ¶ 21.

6. The "Abbott Northwestern" Defendants, comprised of: Abbott Northwestern Hospital ("Abbott"), a hospital owned by Defendant Allina; Northwest Anesthesia, P.A. ("NAPA"), a professional corporation which provides anesthesia services to Abbott; and doctor anesthesiologists who maintain privileges at Abbott and are members and/or employees of NAPA – Bryce Beverlin;

Richard Blomberg; Jean Boening; Mitchell Burke; Rajarano Dwarakanath; Richard Engwall; James Gayes; Luis Giron; Nancy Groves; Jonathan Gudman; Richard Jo[1] - son; John Lillehei; Robert McKlveen; Judith Meisner; Michael Menzel; James Musich; Mark Nissen; Xavier Pereira; David Plut; Jeffrey Shaw; Richard Skoog; William Stauffer; Ofelio Tiu; Robert Tronnier; and John Wintermute. *Id.* at ¶¶ 22-24. Plaintiff also named fictitious Defendants Does I through XX.

The Court's Order of March 3, 1997, provides a detailed description of the complicated facts and procedural history involved in this case. To avoid redundancy, the Court incorporates those facts by reference.

III. DISCUSSION

A. Subject Matter Jurisdiction

Throughout the litigation of the instance case, Defendants have contested subject matter jurisdiction under 31 U.S.C. § 3730(e)(4) of the False Claims Act. The Act provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Officer report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). In the March 3, 1997 Order, this Court ruled that assertion of subject matter jurisdiction

over this action was appropriate. After discussion of the split in the various federal circuit courts of appeals as to the proper test for jurisdiction over *qui tam* lawsuits, the Court adopted a construction of the phrase "based upon [publicly disclosed allegations]" expressed by the Fourth Circuit in *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994), *cert. denied*, 513 U.S. 928 (1994).[1] The order was certified for interlocutory review, but the Eighth Circuit declined to rule on the issue at that juncture in the litigation.

In light of recent decisions by federal courts in four additional circuits, Defendants urge that the issue of subject matter jurisdiction be reconsidered. *See United States ex rel. Biddle v. Board of Trustees of Leland Stanford, Jr. University*, 147 F.3d 821 (9th Cir. 1998); *United States ex rel. McKenzie v. BellSouth Telecommunications, Inc.*, 123 F.3d 935, 938-940 (6th Cir. 1997); *United States ex rel. Lamars v. City of Green Bay*, 998 F. Supp. 971, 980 (E.D. Wis. 1998); and *Wercinski v. Int'l Business Machines Corp.*, 982 F. Supp. 449, 458-461 (S.D. Tex. 1997). After a careful review of these and other cases, the Court is now persuaded that Defendants' construction of the jurisdictional requirements of the False Claims Act is the correct standard. Under this standard, Plaintiff's claims lack subject matter jurisdiction and must be dismissed.

The *qui tam* provisions of the FCA allow a private individual to bring a civil action for violations of the Act, serving as a "realtor" on behalf of the United States

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[1] The uncertainty of the resolution of the issue was forecast in describing the investigation of the phrase "based upon" as "a journey into the netherworld of statutory construction." *See* 3/3/97 Order, at 15.

government. *See* 31 U.S.C. § 3730(b)(1). The government may recover treble damages from anyone who has committed a fraud upon the government, and the individual bringing the case may receive up to thirty percent of the money recovered. 31 U.S.C. § 3730(d)(2). The *qui tam* provisions, however, prohibit plaintiffs from bringing actions which are "based upon" publicly disclosed information unless the plaintiff is the "original source" of the information.[2] An analysis of the subject matter jurisdiction issue in this case requires answers to three questions: (1) was there a public disclosure of the information upon which Plaintiff's claims are based?; (2) is Plaintiff's *qui tam* Complaint "based upon" that public information?; and, (3) was Plaintiff the "original source" of the information? Each question will be addressed in turn.

1. Was There a Public Disclosure of Information Regarding Defendants' Allegedly Fraudulent Conduct?

In the March 3, 1997 Order, the Court determined that the allegations of fraud alleged by the Plaintiff were publicly disclosed in the complaint in the earlier antitrust action, as well as in a series of newspaper articles published before the filing of the *qui tam* lawsuit. *See* 3/3/97

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[2] Specifically, the jurisdictional bar of the FCA provides that:

> (B) For the purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based upon the information.

31 U.S.C. § 3730(e)(4)(B).

Memorandum Order and Opinion, at 14 (*citing United States ex rel. Fed. Recovery Servs. Inc. v. Crescent City E.M.S., Inc.*, 72 F.3d 447, 450 (5th Cir. 1995) (information contained in court filings in prior lawsuit was "publicly disclosed"); *United States ex rel. Rabuska v. Crane Co.*, 40 F.3d 1509, 1512 (8th Cir. 1994)); *United States ex rel. Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 504 (7th Cir. 1989) (allegations contained in prior antitrust complaint were "publicly disclosed").[3]

2. Was Plaintiff's *Qui Tam* Complaint "Based Upon" the Publicly Disclosed Information?

Having found the allegations in MANA's FCA action were publicly disclosed, the Court is not deprived of jurisdiction unless MANA's action was "based upon" those public disclosures. In its March 3, 1997 Order, the Court accepted the position argued by MANA and supported by the Fourth Circuit's decision in *Siller*, 21 F.3d at 1339, that the phrase "based upon" means "derived from." At that time it was determined that the *qui tam* allegations were not directly "derived from" the complaint in the antitrust action or the newspaper articles, and jurisdiction was, therefore, not precluded. *See* 3/3/97 Order, at 15-19. Defendants have argued from the outset that the phrase

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[3] For the purpose of *qui tam* actions, "publicly disclosed" information is generally that which is equally as available to the realtor as to the general public, had they chosen to look at the facts. *See United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1155-56 (3rd Cir. 1991); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322 (2d Cir. 1992). The jurisdictional bar of the Act is given effect only when "the essential elements compromising that fraudulent transaction have been publicly disclosed so as to raise a reasonable inference of fraud." *Rabushka*, 40 F.3d at 1514.

should be interpreted more broadly, as meaning "same as" or "supported by." Under such an interpretation, Defendants maintain that the allegations in MANA's *qui tam* suit, even if not directly derived from the antitrust complaint or articles, should be dismissed if they merely duplicate the public document. In March 1997, Defendants drew support for this interpretation from decisions in the Tenth Circuit (*United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992)), the Eleventh Circuit (*Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562, 567 (11th Cir. 1994), and the D.C. Circuit (*United States ex rel. D.J. Findley v. FPC – Boron Employees' Club, et al.*, 105 F.3d 675, 682 (DC Cir. 1997), *cert. denied*, 118 S.Ct. 172 (1997)).

Since the March, 1997 ruling on this issue, federal courts in the Ninth Circuit (*Biddle*, 147 F.3d at 821), the Sixth Circuit (*McKenzie*, 123 F.3d at 938-940), the Seventh Circuit (*Lamars*, 998 F. Supp. at 980), and the Fifth Circuit (*Wercinski*, 982 F. Supp. at 458-461) have adopted the more expansive interpretation of the phrase "based upon." The mounting federal precedent[4] lends convincing support to Defendants' position which the Court now adopts as the more appropriate definition. Therefore, an inquiry must be made into whether MANA's *qui tam* allegations were "supported by" or "substantially similar" to the information in the publicly disclosed antitrust complaint.

The antitrust complaint, filed on or about November 8, 1994, more than a year before the *qui tam* action, included the following allegations:

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[4] Federal Courts in 7 of 8 Circuits to address the issue have now adopted this interpretation.

> [T]he defendant anesthesiologist groups and their co-conspirators have engaged in a widespread practice of fraudulently billing of anesthesia services in violation of . . . Federal statutes, including § 1128(a)(1)(A). Such violations include, but are not limited to, billing for services that they did not render, billing for operations at which they are not present and inaccurately designating operations as one-on-one for Medicare purposes.
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> * * *
>
> In particular, defendant NMA [sic] engaged in similar false billing practices and false claims in connection with the provision of anesthesia services at Abbott Northwestern Hospital. In particular, anesthesiologists who work for NMA and provide services at Abbott Northwestern have on numerous occasions billed for personally performing operations when they were only present in the operating room for a fraction of the actual anesthesia time . . . Similar statements confirm that anesthesiologists often left the operating room after starting cases late in the day and never returned. Realtor has also obtained and supplied to the Government numerous rejection documents reflecting operations or procedures which were billed by the defendant Abbott Northwestern anesthesiologists as "personally performed" which Realtor is informed and believed were false and fraudulent.

Antirust Complaint, at ¶¶ 66, 57. These allegations mirror the essential elements of the claims in Counts I and II of Plaintiff's Third Amended Complaint. The *qui tam* counts are clearly "substantially similar to" or "supported by" the

antitrust allegations. Because the allegations of fraud in the *qui tam* lawsuit were publicly disclosed in the filing of the antitrust action described in its accompanying press coverage, the Court lacks jurisdiction over the action unless Plaintiff can establish that it was an "original source" of those allegations. *See United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 702 (8th Cir. 1995); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 656 (D.C. Cir. 1994).

3. Was Plaintiff the "Original Source" of the Publicly Disclosed Information?

Even if the allegations in the *qui tam* suit were "based upon publicly disclosed" information, a Plaintiff may still proceed if it was the "original source" of the information – that is, "an individual who has direct and independent knowledge of the information on which the allegations are based *and* has voluntarily provided the information to the Government before filing an action under this section which is based upon the information." 31 U.S.C. § 3730(e)(4)(B) (emphasis added).

Courts have now been reluctant to allow organizations to proceed with claims based upon information compiled directly by the group's members. *See United States ex rel. Federal Recovery Services, Inc. v. Crescent City E.M.S., Inc.*, ___ F.3d ___, ___, 1995 WL 758545 (5th Cir. 1995) (dismissing action brought by corporation when information not collected by the corporation, but by its shareholders); *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 554 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993) (dismissing complaint when information uncovered by corporation's shareholders). Plaintiff relies

upon cases where organizations have been permitted to proceed where the information upon which the complaint was based arose directly from an investigation conducted on behalf of the organization or company itself. *See United States ex rel. Springfield Terminal Ry. Co.*, 14 F.3d 645; *United States ex rel. Hartigan v. Palumbo Bros.*, 797 F. Supp. 624 (N.D. Ill. 1992). MANA did not directly acquire knowledge of the alleged fraud through its own institutional actions, but rather by the individual efforts of its members.

Plaintiff has not identified any case in which a trade association has been allowed to proceed as a *qui tam* plaintiff. Indeed, the posturing of this case undercuts the policy rationale underlying *qui tam* actions. The "whistleblower" case rewards an individual plaintiff or group of plaintiffs for publicly disclosing information regarding fraudulent activities, most often those of an employer. In order to compensate a whistleblower for the inherent job security risks he or she assumes for the public benefit, the FCA allows that party to recover a substantial portion of any damages recovered in the action. By allowing a collective association like MANA to proceed as the named Plaintiff, the individual CRNA's have not assumed the same direct risks undertaken by other whistleblowers.

The philosophy behind the creation of the *qui tam* action is to encourage an individual with personal knowledge of a public danger to notify the public of the clandestine activities of the offending party, without risk of exposure to economic peril or other forms of retaliation. In the matter at hand, the *qui tam* device is being used not to blow a whistle to save the public from a dangerous practice, but rather as a tool in a marketplace battle

between anesthesiologists and nurse anesthetists in their long-fought struggle over the allocation of health care dollars. The design of a *qui tam* action is to create an incentive to report fraud where traditionally there would be a disincentive to the reporting. Here, the Plaintiff beings its litigation armed with a financial incentive from the outset. This *qui tam* suit is being used as a sword to attack the actions of a competitor rather than a shield to protect the interests of a vulnerable individual. To allow a trade association to act as a *qui tam* plaintiff is beyond the intended scope and purpose of the FCA. As such, MANA could not have been an "original source" of the information as envisioned by Congress in drafting the Act.

B. Standing

Plaintiff also lacks standing to bring this action. Pursuant to Article III, Section 2 of the United States Constitution, a federal court may adjudicate a civil action only when the matter presents a "case or controversy." *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). Accordingly, the Supreme Court has held that a litigant must have "standing" to challenge the actions sought to be adjudicated in the lawsuit. *Id.*

To establish standing, a litigant must meet three requirements: (1) the plaintiff must suffer "injury-in-fact" that is "concrete and particularized" and "actual or imminent"; (2) there must be a causal connection between the injury and the action which is the subject of the lawsuit; and, (3) it must be likely that the injury asserted will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

The plaintiff in a *qui tam* suit, referred to as the "realtor," brings the action on behalf of the government. Reconciling the plaintiff's role as an agent of the real party-in-interest with the Constitutional standing requirements has proven difficult.

Courts have employed various modes of analysis to determine whether a *qui tam* plaintiff can constitutionally maintain a federal case. Some courts have held that, by paying the costs of the litigation, a *qui tam* plaintiff has suffered an injury which is redressable by the court. *See, e.g., United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993), *cert. denied*, 508 U.S. 973 (1993). Others have determined that whistleblower plaintiffs suffer constitutional injury given the potential for retaliatory actions by their defendant employers. *See United States ex rel. Roby v. Boeing Co.*, 995 F. Supp. 790 (S.D. Ohio 1998). Finally, a number of appellate courts have explained that the *qui tam* plaintiff is an assignee of United States government – the real "party-in-interest." Under this theory, as long as the United States satisfies the standing requirements, a plaintiff may pursue the whistleblower claim. *See, e.g., United States ex rel. Hall v. Tribal Development Corp.*, 49 F.3d 1208, 1212-14 (7th Cir. 1994); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993); *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 49 (4th Cir. 1992). The latter mode of analysis is most consistent with the policy reasons justifying whistleblower suits. Thus, MANA's standing turns on whether the United States has suffered "injury-in-fact" as a result of the Defendants' alleged actions.

1. Did the United States Suffer Injury as a Result of the Billing of CRNA Services in Medical Necessity Cases?

Plaintiff argues that the FCA does not require actual damages as an element of the prima facie case. *See* Pl. Mem. in Opp. to Summ. J. at 27-28, n.22. The Act clearly states that a violator "is liable to the United States Government for . . . the amount of damages which the Government sustains because of the act of that person . . . " 31 U.S.C. § 3729(a). To survive this motion on standing grounds, Plaintiff must demonstrate the existence of a material fact as to whether the Government has actually been damaged.

Under 42 C.F.R. 414.46(2)(iii), Medicare will not pay CRNAs involved in single, non-concurrent procedures with anesthesiologists unless the hospital could certify that the involvement of both the CRNA and the anesthesiologist was "medically necessary." Plaintiff argues that the Defendant hospitals fraudulently billed for CRNA charges under an "improper modifier" when they billed the procedures as "medically directed" when they knew the anesthesiologists were not continuously present in the operating room. *See* Third Amended Complaint at ¶ 67. Plaintiff, however, does not suggest the form in which the claims should have been submitted to the Government. Presumably, Plaintiff argues that the hospitals should have billed these cases at a higher, non-medically directed rate. *See* Duncan Aff. I., at Ex. 35 (Pl. Ans. to Interrog. 7). Plaintiff has not responded to this aspect of Defendants' argument. When viewing Plaintiff's claims with regard to the medical necessity cases, there is no identified damage to the United States Government. The apparent thrust of Plaintiff's claim is that the Defendant hospitals were

underbilling Medicare when using the improper modifier of "medically directed."

2. Did the United States Government Suffer Injury as a Result of Defendants' Billing of 1:1 Cases as "Personally Performed" Procedures?

By billing 1:1 cases as "personally performed," even when the anesthesiologist left the operating room during the procedure, Plaintiff claims that the Defendants violated the False Claims Act. A close look at this allegation, however, also shows a lack of proof of actual damages suffered by the United States.

Prior to 1998, Health Care Financing Administration (HCFA), one of the government oversight bodies charged with Medicare administration, did not allow dual payment for the services of both an anesthesiologist and a CRNA for a single, nonconcurrent case, because the combined CRNA and anesthesiologist medical direction payment rate exceeded the personal performance rate for the anesthesiologist individually. The testimony of HCFA witnesses indicates that individual carriers had the discretion to divide the personal performance payment on a 1:1 case between the anesthesiologist and the CRNA, as long as the combined payment to the two providers did not exceed the personal performance rate for the anesthesiologist alone. *See* Cuca Depo. at 50-51, 88, 121-122; Menas Depo. at 146-147. As Defendants argue: "In other words, the Medicare program was willing to pay an amount equal to the [anesthesiologist] personal performance rate on a 1:1 case involving a CRNA, and it was up to the local carriers to decide how to divide this pie between the hospital or CRNA and the [anesthesiologist]." Def. Mem. in Supp. of Summ. J. at 52. Defendants correctly characterize the case

as a dispute over the division of the Medicare fund pie, rather than the submission of false claims.

A consideration of the evidence supporting the alleged false claims in 1:1 cases shows that the United States paid for the exact service rendered – personal performance of an anesthesiology procedure. The United States actually paid for the services of two providers at the personal performance rate of one. In actions under the FCA, the level of damages is not measured simply by what the offender billed, but rather by the amount the United States paid out over and above that which it would not have otherwise paid out if the claims had been accurate. *See United States v. Coop. Grain and Supply*, 476 F.2d 47, 62 (8th Cir. 1973). In the context of the 1:1 cases, the Court cannot discern, and Plaintiffs have not clearly articulated, any actual financial damage to the real party in interest – the United States Government.

Plaintiff has not produced evidence to support any actual damages suffered by the United States. In light of the heightened standing requirements set out by the Court in *Lujan*, 504 U.S. at 560, Plaintiff lacks the requisite standing to proceed.

C. Other Grounds For Dismissal

Assuming, *arguendo*, that MANA's case met the Constitutional standards for both jurisdiction and standing, it suffers other serious infirmities as well.

1. Intent to Submit False Claims

In order to support its allegation in Count I of the Third Amended Complaint, MANA must produce evidence

to show that both defendant anesthesiologists and defendant hospitals have knowingly presented, or caused to be presented, to officers or employees of the United States Government, false or fraudulent claims for payment or approval in violation of 31 U.S.C. § 3729(a)(1). *See United States ex rel. Glass v. Medtronic, Inc.*, 957 F.2d 605, 608 (8th Cir. 1992) (in surviving a motion to dismiss, a FCA plaintiff must show the claim was truly "false or fraudulent").

The Medicare regulations involving the billing of "1:1 cases" are susceptible to the interpretation asserted by Defendants – that continuous physical presence by the anesthesiologists is not required. *See* Def. Mem. in Supp. of Summ. J. at 77. In light of this ambiguity, the Plaintiff cannot prove that Defendants *knowingly* submitted false claims. *See United States ex rel. Hochman v. Nackman*, 1998 WL 264841, *7 (when undisputed evidence demonstrates that defendant believed his conduct authorized by government, fraudulent intent is lacking and plaintiff's action must be dismissed).

Even when viewed in the light most favorable to the Plaintiff, the record bears substantial evidence that Defendants billed in accordance with the advice given them by the Government agents – the Medicare carriers. *See Hindo v. University of Health Sciences*, 65 F.3d 608, 613 (7th Cir. 1995), *cert. denied*, 516 U.S. 1114 (1996) (reliance on statements made by Veterans Administration sufficient to nullify defendant's intent to submit a false claim). The confusion on the part of nationwide carriers, members of the anesthesiology and anesthetist professions, and even the HCFA itself demonstrates the need for clarification of the regulations. With such a wide range of reasonable interpretations, Plaintiff is unable to prove the

requisite "fraudulent intent" on the part of the Defendants to "knowingly" submit false claims.

2. Participation in Emergence

Plaintiff argues that the conflicting definitions of "emergence" posited by the two parties create a genuine issue of material fact. Among the seven criteria listed in the Medicare regulations is the requirement that anesthesiologists "personally participate in the most demanding procedures in the anesthesia plan, including . . . emergence." 56 Fed. Reg. 59623 (Nov. 25, 1991). Viewed in the light most favorable to the Plaintiff, the record shows that anesthesiologists routinely left the operating room before the end of the procedure, often speaking with patients in the recovery room or by telephone hours or even days after their procedures. Plaintiff argues that "emergence" – the process of "waking up" from the anesthetic, occurs in the operating room, at the close of the procedure. Under this interpretation, the anesthesiologists could not "personally participate" unless they were physically present in the operating room.

Plaintiff's argument has one major flaw: "emergence" is undefined in the regulations or the Interpretive Medicare Carriers Manual published by the HCFA. Plaintiffs have supplied a separate meaning of the term for use in billing purposes only. A traditional rule of statutory construction is that "where Congress has used technical words or terms of art, 'it [is] proper to explain them by reference to the art or science to which they [are] appropriate.'" *Corning Glass Works v. Brennan*, 417 U.S. 188, 201 (1974). Defendants argue that "emergence" is uniformly understood within the profession as a gradual

process which may last for varying lengths of time, depending upon factors including the age and size of the patient or the nature of the medical procedure conducted.[5] The overwhelming majority of the evidence on the record relating to the medical definition of the term supports Defendants' position. *See* Duncan Aff. III, at 1; Report of Bertram W. Coffer, M.D., Ex. 4, at 6; Report of James F. Arens, MD, Ex. 3, at 7; Deposition of Joseph Kraska, CRNA, at 136-137; Faye Leatherman, CRNA, at 310; Beradine Okonek, CRNA, at 42-43; *see also* Def. Mem. in Supp. of Summ. J., at 92-96. As emergence is not separately defined in the Medicare regulations, it was reasonable for Defendants to have applied the medical profession definition of the term, rather than Plaintiff's billing definition.

3. Plaintiff's Conspiracy Allegations

Count III of MANA's Third Amended Complaint alleges that "Defendant hospitals and anesthesiologists and their defendant agents have conspired to defraud the Government by obtaining or seeking to obtain allowance and payment of false or fraudulent claims . . . in violation of 31 U.S.C. § 3729(a)(3)." To survive summary judgment on a conspiracy count, a plaintiff must produce evidence

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[5] According to the report prepared by Dr. Bertram W. Coffer:

> [E]mergence is not a specific moment in time, but rather a process that involves the elimination of the anesthetic from the patient's body as the patient gradually recovers intellectual functioning. This process usually (but not always) begins in the operating room and extends hours or days thereafter.

Report of Bertram W. Coffer, M.D., Duncan Aff. III, Ex. 4, at 6.

of, inter alia, an agreement between the alleged conspirators – "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Lovett v. General Motors Corp.*, 998 F.2d 575, 579 (8th Cir. 1993), *cert. denied,* 510 U.S. 752, 768 (1984). In considering the conspiracy count in Plaintiff's parallel antitrust case, it was determined that Plaintiff's evidence could not support the existence of an agreement to violate the antitrust laws. *See* 9/24/97 Order, at 6. Plaintiff has produced even less evidence of an agreement in this case.

Plaintiff has made a series of broad allegations that "the Defendants" engaged in a conspiracy to submit false claims. It has made this sweeping claim without any evidence specific to a particular defendant showing a conscious commitment to a concerted coordination of activities. *See Admiral Theatre Corp. v. Douglas Theatre Co.*, 437 F. Supp. 1268, 1287 (D. Neb. 1977), *aff'd*, 585 F.2d 877 (8th Cir. 1978). In order to survive summary judgment on a conspiracy claim, a plaintiff must meet this burden. *See Lovett*, 998 F.2d at 579.

Plaintiff's Count III consists of conclusory allegations that the Defendant hospitals and anesthesiologists conspired to defraud the United States government. Plaintiff has not produced any evidence that officials from Defendants Allina, St. Cloud, or the anesthesiologists ever met, let alone agreed to conspire to engage in a widespread scheme. Plaintiff proffers only inferential evidence that various defendants had the "opportunity" to conspire. *See* Pl. Mem. in Opp. to Summ. J., at 53-55.

For example, Plaintiff claims that AASC President Craig Johnson and MAPA billing manager Al Tank were close friends and neighbors; that the hospitals and the

anesthesiologists entered into routine contracts allocating profits from anesthetic procedures; and that the hospitals refused to require doctors to sign in and out of the operating room or wear beepers, thus minimizing documentation of the fraudulent activities. *Id.* To turn these otherwise innocuous facts into allegations of conspiratorial conduct is an impermissible stretch of facts. *See United States ex rel. El Amin v. George Washington University*, 26 F. Supp. 2d 162, 163 (D.D.C. 1998) (holding that conclusory statements regarding defendants conspiratorial intent, without specific evidence, do not constitute a conspiracy to defraud). Defendants' Motion for Summary Judgment on Plaintiff's Count III is granted.

IV. CONCLUSION

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendants' Motion for Summary Judgment of Plaintiff's claims is **GRANTED IN ITS ENTIRETY**;

2. Plaintiff's Motion for Partial Summary Judgment is **DENIED**; and,

3. Plaintiff's Third Amended Complaint is **DISMISSED WITH PREJUDICE.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 16, 1999

/s/ Ann D. Montgomery
Ann D. Montgomery
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-2356	x	
	x	
Minnesota Association of Nurse Anesthetists, United States of America, ex rel.,	x	Appeal from the United States District Court for the District of Minnesota
Appellant,	x	
vs.	x	
Allina Health System Corp., et al.,	x	
Appellees.	x	

The motion to stay issuance of the mandate has been considered by the court and is denied.

(5120-010199)

May 23, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-2356	x	
	x	
Minnesota Association of Nurse Anesthetists,	x	
	x	
Appellant,	x	Order Denying Petition
	x	for Rehearing and for
vs.	x	Rehearing En Banc
Allina Health System Corp., et al.,	x	
	x	
	x	
Appellees.	x	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judges Bowman, Loken, and Riley would grant the petition for rehearing en banc.

Judge Melloy took no part in the decision in this matter.

(5128-010199)

March 25, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Statutory Provisions

Relevant Excerpts from the False Claims Act

31 U.S.C. § 3729 – False Claims

a) Liability for certain acts. – Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that –

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation; the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. – For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim defined. – For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. – Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of Title 5.

(e) Exclusion. – This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

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31 U.S.C. § 3730 – Civil Actions for False Claims

(a) Responsibilities of the Attorney General. – The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729,

the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall –

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as –

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the

Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to qui tam plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the

action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses. – The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. – In civil actions brought under this section by the United States, the provisions of section 2412(d) of Title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

31 USC § 3731 – False Claims Procedure

(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this Title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought –

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

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31 USC § 3732 – False Claims Jurisdiction

(a) Actions under section 3730. – Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims under state law. – The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

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31 U.S.C. § 3733 – Civil Investigative Demands

(a) In general. –

(1) Issuance and service. – Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person–

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines. –

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall –

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable

period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall–

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall –

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an

attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of Title 28, authorize

the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) Protected material or information. –

(1) In general. – A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under –

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) Effect on other orders, rules, and laws. – Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) Service; jurisdiction. –

(1) By whom served. – Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries. – Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with the section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) Service upon legal entities and natural persons. –

(1) Legal entities. – Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by –

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons. – Service of any such demand or petition may be made upon any natural person by –

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) Proof of service. – A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) Documentary material. –

(1) Sworn certificates. – The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by –

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) Production of materials. – Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) Interrogatories. – Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by –

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) Oral examinations. –

(1) Procedures. – The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present. – The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken. – The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) Transcript of testimony. – When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it,

the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) Certification and delivery to custodian. – The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness. – Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) Conduct of oral testimony. –

(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed

that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of Title 18.

(8) Witness fees and allowances. – Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) Custodians of documents, answers, and transcripts. –

(1) Designation. – The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure. –

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or

transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe –

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person

authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings. – Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) Conditions for return of material. – If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and –

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such

investigation, the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians. – In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly –

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held

responsible for any default or dereliction which occurred before that designation.

(j) Judicial proceedings. –

(1) Petition for enforcement. – Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand. –

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed –

(i) within 20 days after the date of service of the civil investigative demand,

or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery. –

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring

production of any such product of discovery. Any petition under this subparagraph must be filed –

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) Petition to require performance by custodian of duties. – At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve

upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) Jurisdiction. – Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of Title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) Applicability of federal rules of civil procedure. – The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) Disclosure exemption. – Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of Title 5.

(l) Definitions. – For purposes of this section –

(1) the term "false claims law" means –

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term "product of discovery" includes –

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by

any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

Relevant Excerpts from the Program Fraud Civil Remedies Act

31 U.S.C. § 3801 – Definitions

(a) For purposes of this chapter –

(1) "authority" means –

(A) an executive department;

(B) a military department;

(C) an establishment (as such term is defined in section 11(2) of the Inspector General Act of 1978) which is not an executive department; and

(D) the United States Postal Service;

(2) "authority head" means –

(A) the head of an authority; or

(B) an official or employee of the authority designated, in regulations promulgated by the head of the authority, to act on behalf of the head of the authority;

(3) "claim" means any request, demand, or submission –

(A) made to an authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

(B) made to a recipient of property, services, or money from an authority or to a party to a contract with an authority –

(i) for property of services if the United States –

(I) provided such property or services;

(II) provided any portion of the funds for the purchase of such property or services; or

(III) will reimburse such recipient or party for the purchase of such property or services; or

(ii) for the payment of money (including money representing grants, loans, insurance, or benefits) if the United States –

(I) provided any portion of the money requested or demanded; or

(II) will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(C) made to an authority which has the effect of decreasing an obligation to pay or account for property, services, or money, except that such term does not include any claim made in any return of tax imposed by the Internal Revenue Code of 1954;

(4) "investigating official" means an individual who –

(A) (i) in the case of an authority in which an Office of Inspector General is established by the Inspector General Act of 1978 or by any other Federal law, is the Inspector General of that authority or an officer or employee of such Office designated by the Inspector General;

(ii) in the case of an authority in which an Office of Inspector General is not established by the Inspector General Act of 1978 or by any other Federal law, is an officer or employee of the authority designated by the authority head to conduct investigations under section 3803(a)(1) of this Title; or

(iii) in the case of a military department, is the Inspector General of the Department of Defense or an officer or employee of the Office of Inspector General of the Department of Defense who is designated by the Inspector General; and

(B) who, if a member of the Armed Forces of the United States on active duty, is serving in grade O-7 or above or, if a civilian employee, is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule;

(5) "knows or has reason to know", for purposes of establishing liability under section 3802, means that a person, with respect to a claim or statement –

(A) has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(B) acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(C) acts in reckless disregard of the truth or falsity of the claim or statement, and no proof of specific intent to defraud is required;

(6) "person" means any individual, partnership, corporation, association, or private organization;

(7) "presiding officer" means –

(A) in the case of an authority to which the provisions of subchapter II of chapter 5 of Title 5 apply, an administrative law judge appointed in the authority pursuant to section 3105 of such Title or detailed to the authority pursuant to section 3344 of such Title; or

(B) in the case of an authority to which the provisions of such subchapter do not apply, an officer or employee of the authority who –

(i) is selected under chapter 33 of Title 5 pursuant to the competitive examination process applicable to administrative law judges;

(ii) is appointed by the authority head to conduct hearings under section 3803 of this Title;

(iii) is assigned to cases in rotation so far as practicable;

(iv) may not perform duties inconsistent with the duties and responsibilities of a presiding officer;

(v) is entitled to pay prescribed by the Office of Personnel Management independently of ratings and recommendations made by the authority and in accordance with chapter 51 of such Title and subchapter III of chapter 53 of such Title;

(vi) is not subject to performance appraisal pursuant to chapter 43 of such Title; and

(vii) may be removed, suspended, furloughed, or reduced in grade or pay only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing by such Board;

(8) "reviewing official" means any officer or employee of an authority –

(A) who is designated by the authority head to make the determination required under section 3803(a)(2) of this Title;

(B) who, if a member of the Armed Forces of the United States on active duty, is serving in grade O-7 or above or, if a civilian employee, is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule; and

(C) who is –

(i) not subject to supervision by, or required to report to, the investigating official; and

(ii) not employed in the organizational unit of the authority in which the investigating official is employed; and

(9) "statement" means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made –

(A) with respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(B) with respect to (including relating to eligibility for) –

(i) a contract with, or a bid or proposal for a contract with; or

(ii) a grant, loan, or benefit from, an authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit, except that such term does not include any statement made in any return of tax imposed by the Internal Revenue Code of 1954.

(b) For purposes of paragraph (3) of subsection (a) –

(1) each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim;

(2) each claim for property, services, or money is subject to this chapter regardless of whether

such property, services, or money is actually delivered or paid; and

(3) a claim shall be considered made, presented, or submitted to an authority, recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority, recipient, or party.

(c) For purposes of paragraph (9) of subsection (a) –

(1) each written representation, certification, or affirmation constitutes a separate statement; and

(2) a statement shall be considered made, presented, or submitted to an authority when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority.

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31 U.S.C. § 3802 – False Claims and Statements – Liability.

(a) (1) Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know –

(A) is false, fictitious, or fraudulent;

(B) includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(C) includes or is supported by any written statement that –

(i) omits a material fact;

(ii) is false, fictitious, or fraudulent as a result of such omission; and

(iii) is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact; or

(D) is for payment for the provision of property or services which the person has not provided as claimed;

shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $5,000 for each such claim. Except as provided in paragraph (3) of this subsection, such person shall also be subject to an assessment, in lieu of damages sustained by the United States because of such claim, of not more than twice the amount of such claim, or the portion of such claim, which is determined under this chapter to be in violation of the preceding sentence.

(2) Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a written statement that –

(A) the person knows or has reason to know –

(i) asserts a material fact which is false, fictitious, or fraudulent; or

(ii) (I) omits a material fact; and

(II) is false, fictitious, or fraudulent as a result of such omission;

(B) in the case of a statement described in clause (ii) of subparagraph (A), is a statement in which the person making, presenting, or

submitting such statement has a duty to include such material fact; and

(C) contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement,

shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $5,000 for each such statement.

(3) An assessment shall not be made under the second sentence of paragraph (1) with respect to a claim if payment by the Government has not been made on such claim.

(b) (1) Except as provided in paragraphs (2) and (3) of this subsection –

(A) a determination under section 3803(a)(2) of this Title that there is adequate evidence to believe that a person is liable under subsection (a) of this section; or

(B) a determination under section 3803 of this Title that a person is liable under subsection (a) of this section;

may provide the authority with grounds for commencing any administrative or contractual action against such person which is authorized by law and which is in addition to any action against such person under this chapter.

(2) A determination referred to in paragraph (1) of this subsection may be used by the authority, but shall not require such authority, to commence any administrative or contractual action which is authorized by law.

(3) In the case of an administrative or contractual action to suspend or debar any person who is

eligible to enter into contracts with the Federal Government, a determination referred to in paragraph (1) of this subsection shall not be considered as a conclusive determination of such person's responsibility pursuant to Federal procurement laws and regulations

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31 U.S.C. § 3803 – Hearing and Determinations

(a) (1) The investigating official of an authority may investigate allegations that a person is liable under section 3802 of this Title and shall report the findings and conclusions of such investigation to the reviewing official of the authority. The preceding sentence does not modify any responsibility of an investigating official to report violations of criminal law to the Attorney General.

(2) If the reviewing official of an authority determines, based upon the report of the investigating official under paragraph (1) of this subsection, that there is adequate evidence to believe that a person is liable under section 3802 of this Title, the reviewing official shall transmit to the Attorney General a written notice of the intention of such official to refer the allegations of such liability to a presiding officer of such authority. Such notice shall include –

(A) a statement of the reasons of the reviewing official for the referral of such allegations;

(B) a statement specifying the evidence which supports such allegations;

(C) a description of the claims or statements for which liability under section 3802 of this Title is alleged;

(D) an estimate of the amount of money or the value of property or services requested or demanded in violation of section 3802 of this Title; and

(E) a statement of any exculpatory or mitigating circumstances which may relate to such claims or statements.

(b) (1) Within 90 days after receipt of a notice from a reviewing official under paragraph (2) of subsection (a), the Attorney General or an Assistant Attorney General designated by the Attorney General shall transmit a written statement to the reviewing official which specifies –

(A) that the Attorney General or such Assistant Attorney General approves or disapproves the referral to a presiding officer of the allegations of liability stated in such notice;

(B) in any case in which the referral of allegations is approved, that the initiation of a proceeding under this section with respect to such allegations is appropriate; and

(C) in any case in which the referral of allegations is disapproved, the reasons for such disapproval.

(2) A reviewing official may refer allegations of liability to a presiding officer only if the Attorney General or an Assistant Attorney General designated by the Attorney General approves the referral of such allegations in a written statement described in paragraph (1) of this subsection.

(3) If the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to an authority head a written finding that the continuation of any hearing under this section with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, such hearing shall be immediately stayed and may be resumed only upon written authorization of the Attorney General.

(c) (1) No allegations of liability under section 3802 of this Title with respect to any claim made, presented, or submitted by any person shall be referred to a presiding officer under paragraph (2) of subsection (b) if the reviewing official determines that –

(A) an amount of money in excess of $150,000; or

(B) property or services with a value in excess of $150,000, is requested or demanded in violation of section 3802 of this Title in such claim or in a group of related claims which are submitted at the time such claim is submitted.

(2) (A) Except as provided in subparagraph (B) of this paragraph, no allegations of liability against an individual under section 3802 of this Title with respect to any claim or statement made, presented, or submitted, or caused to be made, presented, or submitted, by such individual relating to any benefits received by such individual shall be referred to a presiding officer under paragraph (2) of subsection (b).

(B) Allegations of liability against an individual under section 3802 of this Title with respect

to any claim or statement made, presented, or submitted, or caused to be made, presented, or submitted, by such individual relating to any benefits received by such individual may be referred to a presiding officer under paragraph (2) of subsection (b) if –

(i) such claim or statement is made by such individual in making application for such benefits;

(ii) such allegations relate to the eligibility of such individual to receive such benefits; and

(iii) with respect to such claim or statement, the individual –

(I) has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(II) acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(III) acts in reckless disregard of the truth or falsity of the claim or statement.

(C) For purposes of this subsection, the term "benefits" means –

(i) benefits under the supplemental security income program under Title XVI of the Social Security Act;

(ii) old age, survivors, and disability insurance benefits under Title II of the Social Security Act;

(iii) benefits under Title XVIII of the Social Security Act;

(iv) assistance under a State program funded under part A of Title IV of the Social Security Act [section 601 et seq. of Title 42];

(v) medical assistance under a State plan approved under section 1902(a) of the Social Security Act;

(vi) benefits under Title XX of the Social Security Act;

(vii) benefits under the Food Stamp Program (as defined in section 3(h) of the Food Stamp Act of 1977);

(viii) benefits under chapters 11, 13, 15, 17, and 21 of Title 38;

(ix) benefits under the Black Lung Benefits Act;

(x) benefits under the special supplemental nutrition program for women, infants, and children established under section 17 of the Child Nutrition Act of 1966;

(xi) benefits under section 336 of the Older Americans Act;

(xii) any annuity or other benefit under the Railroad Retirement Act of 1974;

(xiii) benefits under the Richard B. Russell National School Lunch Act;

(xiv) benefits under any housing assistance program for lower income families or elderly or handicapped persons which is administered by the Secretary of Housing and Urban Development or the Secretary of Agriculture;

(xv) benefits under the Low-Income Home Energy Assistance Act of 1981; and

(xvi) benefits under part A of the Energy Conservation in Existing Buildings Act of 1976,

which are intended for the personal use of the individual who receives the benefits or for a member of the individual's family.

(d) (1) On or after the date on which a reviewing official is permitted to refer allegations of liability to a presiding officer under subsection (b) of this section, the reviewing official shall mail, by registered or certified mail, or shall deliver, a notice to the person alleged to be liable under section 3802 of this Title. Such notice shall specify the allegations of liability against such person and shall state the right of such person to request a hearing with respect to such allegations.

(2) If, within 30 days after receiving a notice under paragraph (1) of this subsection, the person receiving such notice requests a hearing with respect to the allegations contained in such notice –

(A) the reviewing official shall refer such allegations to a presiding officer for the commencement of such hearing; and

(B) the presiding officer shall commence such hearing by mailing by registered or certified

mail, or by delivery of, a notice which complies with paragraphs (2)(A) and (3)(B)(i) of subsection (g) to such person.

(e) (1) (A) Except as provided in subparagraph (B) of this paragraph, at any time after receiving a notice under paragraph (2)(B) of subsection (d), the person receiving such notice shall be entitled to review, and upon payment of a reasonable fee for duplication, shall be entitled to obtain a copy of, all relevant and material documents, transcripts, records, and other materials, which relate to such allegations and upon which the findings and conclusions of the investigating official under paragraph (1) of subsection (a) are based.

(B) A person is not entitled under subparagraph (A) to review and obtain a copy of any document, transcript, record, or material which is privileged under Federal law.

(2) At any time after receiving a notice under paragraph (2)(B) of subsection (d), the person receiving such notice shall be entitled to obtain all exculpatory information in the possession of the investigating official or the reviewing official relating to the allegations contained in such notice. The provisions of subparagraph (B) of paragraph (1) do not apply to any document, transcript, record, or other material, or any portion thereof, in which such exculpatory information is contained.

(f) Any hearing commenced under paragraph (2) of subsection (d) shall be conducted by the presiding officer on the record in order to determine –

(1) the liability of a person under section 3802 of this Title; and

(2) If a person is determined to be liable under such section, the amount of any civil penalty or assessment to be imposed on such person.

Any such determination shall be based on the preponderance of the evidence.

(g) (1) Each hearing under subsection (f) of this section shall be conducted –

(A) In the case of an authority to which the provisions of subchapter II of chapter 5 of Title 5 apply, in accordance with –

(i) the provisions of such subchapter to the extent that such provisions are not inconsistent with the provisions of this chapter; and

(ii) procedures promulgated by the authority head under paragraph (3) of this subsection; or

(B) in the case of an authority to which the provisions of such subchapter do not apply, in accordance with procedures promulgated by the authority head under paragraphs (2) and (3) of this subsection.

(2) An authority head of an authority described in subparagraph (B) of paragraph (1) shall by regulation promulgate procedures for the conduct of hearings under this chapter. Such procedures shall include:

(A) The provision of written notice of the hearing to any person alleged to be liable under section 3802 of this Title, including written notice of –

(i) the time, place, and nature of the hearing;

(ii) the legal authority and jurisdiction under which the hearing is to be held; and

(iii) the matters of facts and law to be asserted.

(B) The provision to any person alleged to be liable under section 3802 of this Title of opportunities for the submission of facts, arguments, offers of settlement, or proposals of adjustment.

(C) Procedures to ensure that the presiding officer shall not, except to the extent required for the disposition of ex parte matters as authorized by law –

(i) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to the hearing to participate; or

(ii) be responsible to or subject to the supervision or direction of the investigating official or the reviewing official.

(D) Procedures to ensure that the investigating official and the reviewing official do not participate or advise in the decision required under subsection (h) of this section or the review of the decision by the authority head under subsection (i) of this section, except as provided in subsection (j) of this section.

(E) The provision to any person alleged to be liable under section 3802 of this Title of opportunities to present such person's case through oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(F) Procedures to permit any person alleged to be liable under section 3802 of this Title to be accompanied, represented, and advised by counsel or such other qualified representative as the authority head may specify in such regulations.

(G) Procedures to ensure that the hearing is conducted in an impartial manner, including procedures to –

(i) permit the presiding officer to at any time disqualify himself; and

(ii) permit the filing, in good faith, of a timely and sufficient affidavit alleging personal bias or another reason for disqualification of a presiding officer or a reviewing official.

(3) (A) Each authority head shall promulgate by regulation procedures described in subparagraph (B) of this paragraph for the conduct of hearings under this chapter. Such procedures shall be in addition to the procedures described in paragraph (1) or paragraph (2) of this subsection, as the case may be.

(B) The procedures referred to in subparagraph (A) of this paragraph are:

(i) Procedures for the inclusion, in any written notice of a hearing under this section to any person alleged to be liable under section 3802 of this Title, of a description of the procedures for the conduct of the hearing.

(ii) Procedures to permit discovery by any person alleged to be liable under section 3802 of this Title only to the extent that the presiding officer determines that such discovery is necessary for the expeditious, fair, and reasonable consideration of the issues, except that such procedures shall not apply to documents, transcripts, records, or other material which a person is entitled to review under paragraph (1) of subsection (e) or to information to which a person is entitled under paragraph (2) of such subsection. Procedures promulgated under this clause shall prohibit the discovery of the notice required under subsection (a)(2) of this section.

(4) Each hearing under subsection (f) of this section shall be held –

(A) in the judicial district of the United States in which the person alleged to be liable under section 3802 of this Title resides or transacts business;

(B) in the judicial district of the United States in which the claim or statement upon which the allegation of liability under such section was made, presented, or submitted; or

(C) in such other place as may be agreed upon by such person and the presiding officer who will conduct such hearing.

(h) The presiding officer shall issue a written decision, including findings and determinations, after the conclusion of the hearing. Such decision shall include the findings of fact and conclusions of law which the presiding officer relied upon in determining whether a person is liable under this chapter. The presiding officer shall promptly send to each party to the hearing a copy of such decision and a statement describing the right of any person determined to be liable under section 3802 of this Title to appeal the decision of the presiding officer to the authority head under paragraph (2) of subsection (i).

(i) (1) Except as provided in paragraph (2) of this subsection and section 3805 of this Title, the decision, including the findings and determinations, of the presiding officer issued under subsection (h) of this section are final.

(2) (A) (i) Except as provided in clause (ii) of this subparagraph, within 30 days after the presiding officer issues a decision under subsection (h) of this section, any person determined in such decision to be liable under section 3802 of this Title may appeal such decision to the authority head.

(ii) If, within the 30-day period described in clause (i) of this subparagraph, a person determined to be liable under this chapter requests the authority head for an extension of such 30-day period to file an appeal of a decision issued by the presiding officer under subsection (h) of this section, the authority head extend such period if such person demonstrates good cause for such extension.

(B) Any authority head reviewing under this section the decision, findings, and determinations of a presiding officer shall not consider any objection that was not raised in the hearing conducted pursuant to subsection (f) of this section unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection. If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the authority head shall remand the matter to the presiding officer for consideration of such additional evidence.

(C) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the presiding officer pursuant to this section. The authority head shall promptly send to each party to the appeal a copy of the decision of the authority head and a statement describing the right of any person determined to be liable under section 3802 of this Title to judicial review under section 3805 of this Title.

(j) The reviewing official has the exclusive authority to compromise or settle any allegations of liability under section 3802 of this Title against a person without the consent of the presiding officer at any time after the date on which the reviewing official is permitted to refer allegations of liability to a presiding officer under

subsection (b) of this section and prior to the date on which the presiding officer issues a decision under subsection (h) of this section. Any such compromise or settlement shall be in writing.

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31 U.S.C. § 3804 – Subpoena Authority

(a) For the purposes of an investigation under section 3803(a)(1) of this Title, an investigating official is authorized to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and data not otherwise reasonably available to the authority.

(b) For the purposes of conducting a hearing under section 3803(f) of this Title, a presiding officer is authorized –

(1) to administer oaths or affirmations; and

(2) to require by subpoena the attendance and testimony of witnesses and the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence which the presiding officer considers relevant and material to the hearing.

(c) In the case of contumacy or refusal to obey a subpoena issued pursuant to subsection (a) or (b) of this section, the district courts of the United States shall have jurisdiction to issue an appropriate order for the enforcement of any such subpoena. Any failure to obey such order of the court is punishable by such court as contempt. In any case in which an authority seeks the enforcement of a subpoena issued pursuant to subsection (a) or (b) of this section, the authority shall request the Attorney General to petition any district court in which a hearing under this chapter is being

conducted, or in which the person receiving the subpoena resides or conducts business, to issue such an order.

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31 U.S.C. § 3805 – Judicial Review

(a) (1) A determination by a reviewing official under section 3803 of this Title shall be final and shall not be subject to judicial review.

(2) Unless a petition is filed under this section, a determination under section 3803 of this Title that a person is liable under section 3802 of this Title shall be final and shall not be subject to judicial review.

(b) (1) (A) Any person who has been determined to be liable under section 3802 of this Title pursuant to section 3803 of this Title may obtain review of such determination in –

(i) the United States district court for the district in which such person resides or transacts business;

(ii) the United States district court for the district in which the claim or statement upon which the determination of liability is based was made, presented, or submitted; or

(iii) the United States District Court for the District of Columbia.

(B) Such review may be obtained by filing in any such court a written petition that such determination be modified or set aside. Such petition shall be filed –

(i) only after such person has exhausted all administrative remedies under this chapter; and

(ii) within 60 days after the date on which the authority head sends such person a copy of the decision of such authority head under section 3803(i)(2) of this Title.

(2) The clerk of the court shall transmit a copy of a petition filed under paragraph (1) of this subsection to the authority and to the Attorney General. Upon receipt of the copy of such petition, the authority shall transmit to the Attorney General the record in the proceeding resulting in the determination of liability under section 3802 of this Title. Except as otherwise provided in this section, the district courts of the United States shall have jurisdiction to review the decision, findings, and determinations in issue and to affirm, modify, remand for further consideration, or set aside, in whole or in part, the decision, findings, and determinations of the authority, and to enforce such decision, findings, and determinations to the extent that such decision, findings, and determinations are affirmed or modified.

(c) The decisions, findings, and determinations of the authority with respect to questions of fact shall be final and conclusive, and shall not be set aside unless such decisions, findings, and determinations are found by the court to be unsupported by substantial evidence. In concluding whether the decisions, findings, and determinations of an authority are unsupported by substantial evidence, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(d) Any district court reviewing under this section the decision, findings, and determinations of an authority shall not consider any objection that was not raised in the hearing conducted pursuant to section 3803(f) of this Title unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection. If any party demonstrates to the satisfaction of the court that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the court shall remand the matter to the authority for consideration of such additional evidence.

(e) Upon a final determination by the district court that a person is liable under section 3802 of this Title, the court shall enter a final judgment for the appropriate amount in favor of the United States.

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31 U.S.C. § 3806 – Collection of Civil Penalties and Assessments

(a) The Attorney General shall be responsible for judicial enforcement of any civil penalty or assessment imposed pursuant to the provisions of this chapter.

(b) Any penalty or assessment imposed in a determination which has become final pursuant to this chapter may be recovered in a civil action brought by the Attorney General. In any such action, no matter that was raised or that could have been raised in a hearing conducted under section 3803(f) of this Title or pursuant to judicial review under section 3805 of this title may be raised as a defense, and the determination of liability and the determination of amounts of penalties and assessments shall not be subject to review.

(c) The district courts of the United States shall have jurisdiction of any action commenced by the United States under subsection (b) of this section.

(d) Any action under subsection (b) of this section may, without regard to venue requirements, be joined and consolidated with or asserted as a counterclaim, crossclaim, or setoff by the United States in any other civil action which includes as parties the United States and the person against whom such action may be brought.

(e) The United States Claims Court shall have jurisdiction of any action under subsection (b) of this section to recover any penalty or assessment if the cause of action is asserted by the United States as a counterclaim in a matter pending in such court.

(f) The Attorney General shall have exclusive authority to compromise or settle any penalty or assessment the determination of which is the subject of a pending petition pursuant to section 3805 of this Title or a pending action to recover such penalty or assessment pursuant to this section.

(g) (1) Except as provided in paragraph (2) of this subsection, any amount of penalty or assessment collected under this chapter shall be deposited as miscellaneous receipts in the Treasury of the United States.

(2) (A) Any amount of a penalty or assessment imposed by the United States Postal Service under this chapter shall be deposited in the Postal Service Fund established by section 2003 of Title 39.

(B) Any amount of a penalty or assessment imposed by the Secretary of Health and Human Services under this chapter with respect to a claim or statement made in connection with

old age and survivors benefits under Title II of the Social Security Act shall be deposited in the Federal Old-Age and Survivors Insurance Trust Fund.

(C) Any amount of a penalty or assessment imposed by the Secretary of Health and Human Services under this chapter with respect to a claim or statement made in connection with disability benefits under Title II of the Social Security Act shall be deposited in the Federal Disability Insurance Trust Fund.

(D) Any amount of a penalty or assessment imposed by the Secretary of Health and Human Services under this chapter with respect to a claim or statement made in connection with benefits under part A of Title XVIII of the Social Security Act shall be deposited in the Federal Hospital Insurance Trust Fund.

(E) Any amount of a penalty or assessment imposed by the Secretary of Health and Human Services under this chapter with respect to a claim or statement made in connection with benefits under part B of Title XVIII of the Social Security Act shall be deposited in the Federal Supplementary Medical Insurance Trust Fund

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31 U.S.C. § 3807 – Right to Administrative Offset

(a) The amount of any penalty or assessment which has become final under section 3803 of this Title, or for which a judgment has been entered under section

3805(e) or 3806 of this Title, or any amount agreed upon in a settlement or compromise under section 3803(j) or 3806(f) of this Title, may be collected by administrative offset under section 3716 of this Title, except that an administrative offset may not be made under this subsection against a refund of an overpayment of Federal taxes, then or later owing by the United States to the person liable for such penalty or assessment.

(b) All amounts collected pursuant to this section shall be remitted to the Secretary of the Treasury for deposit in accordance with section 3806(g) of this Title.

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31 U.S.C. § 3808 – Limitations

(a) A hearing under section 3803(d)(2) of this Title with respect to a claim or statement shall be commenced within 6 years after the date on which such claim or statement is made, presented, or submitted.

(b) A civil action to recover a penalty or assessment under section 3806 of this Title shall be commenced within 3 years after the date on which the determination of liability for such penalty or assessment becomes final.

(c) If at any time during the course of proceedings brought pursuant to this chapter the authority head receives or discovers any specific information regarding bribery, gratuities, conflict of interest, or other corruption or similar activity in relation to a false claim or statement, the authority head shall immediately report such information to the Attorney General, and in the case of an authority in which an Office of Inspector General is established by the

Inspector General Act of 1978 or by any other Federal law, to the Inspector General of that authority.

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31 U.S.C. § 3809 – Regulations

Within 180 days after the date of enactment of this chapter, each authority head shall promulgate rules and regulations necessary to implement the provisions of this chapter. Such rules and regulations shall –

(1) ensure that investigating officials and reviewing officials are not responsible for conducting the hearing required in section 3803(f) of this Title, making the determinations required by subsections (f) and (h) of section 3803 of this Title, or making collections under section 3806 of this Title; and

(2) require a reviewing official to include in any notice required by section 3803(a)(2) of this Title a statement which specifies that the reviewing official has determined that there is a reasonable prospect of collecting, from a person with respect to whom the reviewing official is referring allegations of liability in such notice, the amount for which such person may be liable.

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31 U.S.C. § 3810 – Repealed

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31 U.S.C. § 3811 – Effect On Other Law

(a) This chapter does not diminish the responsibility of any agency to comply with the provisions of chapter 35 of Title 44.

(b) This chapter does not supersede the provisions of section 3512 of Title 44.

(c) For purposes of this section, the term "agency" has the same meaning as in section 3502(1) of Title 44.

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31 U.S.C. § 3812 – Prohibition Against Delegation

Any function, duty, or responsibility which this chapter specifies be carried out by the Attorney General or an Assistant Attorney General designated by the Attorney General, shall not be delegated to, or carried out by, any other officer or employee of the Department of Justice.

Relevant Excerpts from the Dictionary Act

1 U.S.C. § 1 – Dictionary Act

In determining the meaning of any Act of Congress, unless the context indicates otherwise –

words importing the singular include and apply to several persons, parties, or things;

words importing the plural include the singular;

words importing the masculine gender include the feminine as well;

words used in the present tense include the future as well as the present;

the words "insane" and "insane person" and "lunatic" shall include every idiot, lunatic, insane person, and person non compos mentis;

the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

"officer" includes any person authorized by law to perform the duties of the office;

"signature" or "subscription" includes a mark when the person making the same intended it as such;

"oath" includes affirmation, and "sworn" includes affirmed;

"writing" includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.

Regulatory Provisions

The regulations covering payment for Part B medical and other health services for physicians and other practioners states in relevant part:

42 C.F.R. § 414.46 – Additional rules for payment of anesthesia services:

(a) Definitions. For purposes of this section, the following definitions apply:

(1) Base unit means the value for each anesthesia code that reflects all activities other than anesthesia time. These activities include usual preoperative and postoperative visits, the administration of fluids and blood incident to anesthesia care, and monitoring services.

(2) Anesthesia practitioner, for the purpose of anesthesia time, means a physician who performs the anesthesia service alone, a CRNA who is not medically directed who performs the anesthesia service alone, or a medically directed CRNA.

(3) Anesthesia time means the time during which an anesthesia practitioner is present with the patient. It starts when the anesthesia practitioner begins to prepare the patient for anesthesia services and ends when the anesthesia practitioner is no longer furnishing anesthesia services to the beneficiary, that is, when the beneficiary may be placed safely under postoperative care. Anesthesia time is a continuous time period from the start of anesthesia to the end of an anesthesia service. In counting anesthesia time, the anesthesia practitioner can add blocks of anesthesia time around an interruption in anesthesia time as long as the anesthesia practitioner is furnishing continuous anesthesia care within the time periods around the interruption.

(b) Determinations of payment amount – Basic rule. For anesthesia services performed, medically directed, or medically supervised by a physician, the carrier pays the lesser of the actual charge or the anesthesia fee schedule amount.

(1) The carrier bases the fee schedule amount for an anesthesia service on the product of the sum of allowable base and time units and an anesthesia-specific CF. The carrier calculates the time units

from the anesthesia time reported by the anesthesia practitioner for the anesthesia procedure. The physician who fulfills the conditions for medical direction in § 415.110 (Conditions for payment: Anesthesiology services) reports the same anesthesia time as the medically-directed CRNA.

(2) CMS furnishes the carrier with the base units for each anesthesia procedure code. The base units are derived from the 1988 American Society of Anesthesiologists' Relative Value Guide except that the number of base units recognized for anesthesia services furnished during cataract or iridectomy surgery is four units.

(3) Modifier units are not allowed. Modifier units include additional units charged by a physician or a CRNA for patient health status, risk, age, or unusual circumstances.

(c) Physician personally performs the anesthesia procedure.

(1) CMS considers an anesthesia service to be personally performed under any of the following circumstances:

(i) The physician performs the entire anesthesia service alone.

(ii) The physician establishes an attending physician relationship in one or two concurrent cases involving an intern or resident and the service was furnished before January 1, 1994.

(iii) The physician establishes an attending physician relationship in one case involving an intern or resident and the service was furnished on or after January 1, 1994 but prior to January 1, 1996. For services on or after

January 1, 1996, the physician must be the teaching physician as defined in §§ 415.170 through 415.184 of this chapter.

(iv) The physician and the CRNA or AA are involved in a single case and the services of each are found to be medically necessary.

(v) The physician is continuously involved in a single case involving a student nurse anesthetist.

(vi) The physician is continuously involved in a single case involving a CRNA or AA and the service was furnished prior to January 1, 1998.

(2) CMS determines the fee schedule amount for an anesthesia service personally performed by a physician on the basis of an anesthesia-specific fee schedule CF and unreduced base units and anesthesia time units. One anesthesia time unit is equivalent to 15 minutes of anesthesia time, and fractions of a 15-minute period are recognized as fractions of an anesthesia time unit.

(d) Anesthesia services medically directed by a physician.

(1) CMS considers an anesthesia service to be medically directed by a physician if:

(i) The physician performs the activities described in § 415.110 of this chapter.

(ii) The physician directs qualified individuals involved in two, three, or four concurrent cases.

(iii) Medical direction can occur for a single case furnished on or after January 1, 1998 if the physician performs the

activities described in § 415.110 of this chapter and medically directs a single CRNA or AA.

(2) The rules for medical direction differ for certain time periods depending on the nature of the qualified individual who is directed by the physician. If more than two procedures are directed on or after January 1, 1994, the qualified individuals could be AAs, CRNAs, interns, or residents. The medical direction rules apply to student nurse anesthetists only if the physician directs two concurrent cases, each of which involves a student nurse anesthetist or the physician directs one case involving a student nurse anesthetist and the other involving a CRNA, AA, intern, or resident.

(3) Payment for medical direction is based on a specific percentage of the payment allowance recognized for the anesthesia service personally performed by a physician alone. The following percentages apply for the years specified:

(i) CY 1994 – 60 percent of the payment allowance for personally performed procedures.

(ii) CY 1995 – 57.5 percent of the payment allowance for personally performed services.

(iii) CY 1996 – 55 percent of the payment allowance for personally performed services.

(iv) CY 1997 – 52.5 percent of the payment allowance for personally performed services.

(v) CY 1998 and thereafter – 50 percent of thepayment allowance for personally performed services.

Regulatory Provisions - Repealed

42 C.F.R. § 414.451 (1992) Basic methodology for calculating anesthetist fee schedule.

(a) Fee schedules. HCFA establishes separate State-level fee schedules for –

(1) Anesthetists whose services are medically-directed; and

(2) Anesthetists whose services are not medically-directed.

(b) Calculation of conversion factors for anesthetists who are medically directed.

(1) Hospital-employed anesthetists. State-specific conversion factors for medically-directed hospital employed anesthetists are computed from the 1987 American Association of Nurse Anesthetists annual membership survey, as follows:

(i) An average cost per case is computed by dividing the total reported State salaries of full and part-time medically-directed hospital-employed anesthetists by the total reported anesthetics administered by the anesthetists.

(ii) A base conversion factor is computed by dividing the average cost per case by the estimated national average of base and time units for an anesthesia case involving a

hospital-employed medically-directed anesthetist.

(iii) The conversion factor is adjusted to reflect an allowance that approximates fringe benefits and allowable hospital overhead associated with anesthetists' services.

(iv) The 1987 conversion factor is updated by an inflation factor through 1989.

(v) The conversion factor is increased to include a State specific amount for malpractice expense. The resultant amounts are considered to be State-specific conversion factors for medically-directed hospital-employed anesthetists.

(2) Physician-employed anesthetists. State specific conversion factors for medically-directed physician-employed anesthetists are computed as follows:

(i) The 1989 Statewide locality prevailing charge conversion factor for anesthesia services of participating physicians, as adjusted by the MEI, is multiplied by the average time per anesthesia case involving a medically directed physician-employed anesthetist, and divided by 30 minutes. (If there are multiple localities within a State or more than one carrier serves a State, a single, Statewide weighed average participating physician prevailing charge is applied.)

(ii) The resulting amount is divided by the average number of base and time units per anesthesia case involving a physician who medically directs and employs the CRNA.

(3) Calculation of medically-directed conversion factors. The applicable State-specific conversion factors for anesthetists who are medically directed are based on a blend of 58 percent of the hospital-employed conversion factor and 42 percent of the physician-employed conversion factor calculated under paragraphs (b)(1) and (b)(2) of this section, respectively.

(c) Calculation of conversion factors for anesthetists who are not medically directed. The State-specific conversion factors for anesthetists who are not medically directed are computed under the procedures in paragraph (b)(1) of this section except that;

(1) The total reported State salaries of full and part-time nonmedically-directed anesthetists and the total reported anesthetics administered by these anesthetists are used to compute an average cost per case; and

(2) A base conversion factor is computed by dividing the average cost per case by the estimated national average number of base and time units for an anesthesia case involving a nonmedically-directed anesthetist.

(d) Exceptions.–

(1) Insufficient State-level data for one conversion factor. If only one of the State-level conversion factors can be calculated, the other conversion factor is calculated based on that factor and on national statistics.

(2) Insufficient State-level data for both medically-directed and nonmedically-directed conversion factors. If neither the State-level medically-directed nor nonmedically-directed conversion factors can be calculated from State-specific data,

regional data are used to calculate both conversion factors.

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42 C.F.R. § 405.552 (1991) Conditions for payment of charges: Anesthesiology services.

(a) Services furnished directly or concurrently. The carrier will reimburse a physician for anesthesiology services furnished to patients in a provider on a reasonable charge basis only if the services meet the conditions for reasonable charge payment in § 405.550(b) and the following additional conditions are met:

(1) For each patient, the physician–

(i) Performs a pre-anesthetic examination and evaluation;

(ii) Prescribes the anesthesia plan;

(iii) Personally participates in the most demanding procedures in the anesthesia plan, including induction and emergence;

(iv) Ensures that any procedures in the anesthesia plan that he or she does not perform are performed by a qualified individual;

(v) Monitors the course of anesthesia administration at frequent intervals;

(vi) Remains physically present and available for immediate diagnosis and treatment of emergencies; and

(vii) Provides indicated postanesthesia care.

(2) The physician either performs the procedure directly, without the assistance of an anesthetist,

or directs no more than four anesthesia procedures concurrently, and does not perform any other services while he or she is directing the concurrent procedures.

(b) Supervision of more than four procedures concurrently. If the physician is involved in furnishing more than four procedures concurrently, or is performing other services while directing the concurrent procedures, the concurrent anesthesia services are physician services to the provider in which the procedures are performed. In such cases, the physician is not required to meet the criteria of paragraphs (a)(1)(iii) and (vii) of this section personally, but must ensure that a qualified individual performs any procedure in which the physician does not personally participate. In these cases, the intermediary will pay for the services under the rules in §§ 405.480 and 405.481 on reasonable cost payment for physician services to providers.

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

MINNESOTA ASSOCIATION OF NURSE ANESTHETISTS, GAYLE McKAY, LADONNA SCHWEER, JOHN OKONEK, BERNADINE OKONEK, ANNETTE ATCHISON, FRED BENJAMIN, BARY [sic] BARRY, FAYE LEATHERMAN, SUE MILBACH, SANDRA HENSCHKE, JUDITH A. SCHMIDT and GARY HAGEN,

Plaintiffs,

v.

UNITY HOSPITAL, MERCY HOSPITAL, WILLIAM MACNALLY, President and Chief Executive Officer of Unity

COMPLAINT AND DEMAND FOR JURY TRIAL

and Mercy Hospitals, ALLINA HEALTH SYSTEM CORP., MARK SPERRY, MDA, GARY BAGGENSTOSS, M.D., JOHN MURPHY, in his capacity as Vice President of Unity and Mercy Medical Centers, JAMES CUMMING, M.D., JOHN RYDBERG, M.D., MIDWEST ANESTHESIA, P.A., THELMA M. ALBAY, M.D., MINDA CASTILLEJOS, M.D., TERI HEIL, M.D., SANG HONG, M.D., TED JANOSSY, M.D., RAYMOND KLOEPPER II, M.D., JOHN MAGDSICK, M.D., THOMAS MAGGS, M.D., THOMAS POLTA, M.D., JOHN ROSEBERG, M.D., JAI SUH, M.D., JEFFREY YUE, M.D., MARK EGGEN, M.D., METROPOLITAN ANESTHESIA NETWORK, ALLEN TANK, THEODORE GRINDAL, ESQ., CRAIG JOHNSON, M.D., (both individually and in his capacity as President of the Minnesota Society of Anesthesiologists, ST. CLOUD HOSPITAL, JOHN FROBEMIUS, Chief Executive Officer of St. Cloud Hospital, LINDA CHIMIELEWSKY, Vice President Hospital Operations of

St. Cloud Hospital, ANESTHESIA ASSOCIATES OF ST. CLOUD LTD., GARY A BOEKE, M.D., PHILIP F. BOYLE, M.D., L. MICHAEL ESPELAND, M.D., ALAN D. ESPELIEN, M.D., PAUL J. HALVERSON, M.D., LANSE C. LANG, M.D., A. WADE McMILLAN, M.D., WILLIAM H. RICE, M.D., ALLAN REITZ, M.D. and ANNETTE E. ZWICK, M.D.,

Defendants.

Plaintiffs as and for their Complaint against defendants say:

1. This is an action for injunctive relief and damages arising out of a wide-spread conspiracy involving the instant defendants and MDAs at virtually every major general hospital in the Twin Cities area and throughout Minnesota whose objective is nothing less than the complete elimination of certified registered nurse anesthetists as low-cost competitors for the provision of anesthesia services in every market in which defendants and their co-conspirators operate. This action sounds in anti-trust under both Federal and state laws, including illegal boycotts, illegal tying arrangements, attempted monopolization and agreements in unreasonable restraint of trade. Defendants are also accused of multiple violations of the Minnesota Consumer Protection Act, Minn. Stat. § 3252 F.69, the Minnesota Deceptive Practices Act Minn. Stat. § 325.044, tortious interference with contractual and

prospective business relations, unfair competition, fraudulent billing in violation of various State and Federal Medicare statutes, participation in multiple terminations against public policy, breach of contract, violations of applicable whistleblowing statutes (Minn. Stat. 181.932), breach of covenant of good faith and fair dealing and civil conspiracy to commit the foregoing. Accordingly, this Court has jurisdiction over the causes of action alleged in the complaint pursuant to 15 U.S.C. §§ 15, 16 and 31 and Title 28 U.S.C. §§ 1331, 1332 and 1337, as well as supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

2. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) as it is the district where all defendants reside and in which the claim arose.

THE PARTIES

3. Plaintiff Minnesota Association of Nurse Anesthetists ("MANA") is an association formed for the purpose of preserving and advancing the profession of Certified Registered Nurse Anesthetists in Minnesota and, among other things, to engage in activities to promote and protect the legal rights of its members through, among other things, lobbying efforts, legal action and public relations activities.

4. Plaintiff Gayle McKay ("McKay") is the President of MANA and a member of its Board of Directors. She is also a certified registered nurse anesthetist who at all times pertinent hereto was duly licensed in the practice of administering anesthesia in the State of Minnesota. McKay is also currently certified by the American Association of Nurse Anesthetists and is a member of that association. McKay is a resident of Apple Valley, Minnesota.

5. Plaintiffs Ladonna Schweer ("Schweer"), John Okonek ("J. Okonek"), Bernadine Okonek ("B. Okonek"), Annette Atchison ("Atchison"), and Fred Benjamin ("Benjamin") are certified registered nurse anesthetists who at all times pertinent hereto were duly licensed in the practice of administering anesthesia in the State of Minnesota and associated with defendant Unity Hospital. Plaintiffs Bart Barry ("Barry"), Faye Leatherman ("Leatherman") and Sue Milbach ("Milbach") are certified registered nurse anesthetists who at all times pertinent hereto were duly licensed in the practice of administering anesthesia in the State of Minnesota and associated with defendant Mercy Hospital. The plaintiffs named in this paragraph will hereinafter be referred to as the "Unity/Mercy plaintiffs."

6. Plaintiffs Sandra Henschke ("Henschke") and Judith A. Schmidt ("Schmidt") are certified registered nurse anesthetists who at all times pertinent hereto were duly licensed in the practice of administering anesthesia in the State of Minnesota and associated with defendant St. Cloud Hospital. The plaintiffs named in this paragraph will hereinafter be referred to as the "St. Cloud plaintiffs."

7. Plaintiff Gary Hagen ("Hagen") is a certified registered nurse anesthetist who at all times pertinent hereto was duly licensed in the practice of administering anesthesia in the State of Minnesota and associated with St. Francis Hospital in Shakopee which is owned by defendant Allina and serviced by defendant MAN.

8. Defendant Allina Health System Corp. ("Allina") is a non-profit corporation and integrated health care system. Allina owns or operates 17 hospitals, 2 nursing homes and clinics in more than 40 locations throughout Minnesota and Western Wisconsin. Allina owns defendants

Unity and Mercy Hospital, Abbott Northwestern Hospital, United Hospital, Phillips Eye Institute and St. Francis Regional Medical Center in Shakopee. On information and belief, Allina is currently negotiating to purchase defendant St. Cloud Hospital.

9. Defendant Unity Hospital ("Unity") is a hospital operating at 550 Osborne Road in Fridley, Minnesota.

10. Defendant Mercy Hospital ("Mercy") is a hospital operating at 4050 Coon Rapids Boulevard in Coon Rapids, Minnesota.

11. Defendant William MacNally ("MacNally") is President and Chief Executive Officer of Unity and Mercy Hospitals.

12. Defendant John Murphy ("Murphy") is currently and was at all times pertinent hereto Vice President of Unity and Mercy Hospitals.

13. Defendant Midwest Anesthesia, P.A. ("MAPA") is a professional association which engages in, among other things, the provision of anesthesiological services to the defendants Unity and Mercy Hospitals.

14. Defendants Thelma M. Albay, M.D. ("Albay"), Gary Baggenstoss, M.D. ("Baggenstoss"), Minda Castillejos, M.D. ("Castillejos"), David Cumming, M.D. ("Cumming"), Teri Heil, M.D. ("Heil"), Sang Hong, M.D. ("Hong"), Ted Janossy, M.D. ("Janossy"), Raymond Kloepper, II, M.D. ("Kloepper"), John Magdsick, M.D. ("Magdsick"), Thomas Maggs, M.D. ("Maggs"), Thomas Polta, M.D. ("Polta"), John Roseberg, M.D. ("Roseberg"), Jai Suh, M.D. ("Suh"), Jeffrey Yue, M.D. (Yue"), Mark Eggen, M.D. ("Eggen"), Mark Sperry, M.D. ("Sperry") and John Rydberg, M.D. ("Rydberg") are medical doctors

specializing in anesthesia who maintained privileges at Unity and/or Mercy Hospitals at all times relevant to this Complaint and are members of MAPA (hereinafter collectively the "Unity/Mercy MDAs").

15. Defendant Metropolitan Anesthesia Network ("MAN") is a professional corporation which owns and controls MAPA, as well as other professional associations which anesthesiologists which privileges at Fairview Southdale Hospital, Fairview Ridges Hospital, several children's hospitals, and St. Francis Regional Medical Center.

16. Defendant Allen Tank ("Tank") at all times pertinent hereto was an employee of defendants MAPA and MAN and performed business management functions for these groups, as well as other anesthesiologist groups in the Twin Cities area. He is a resident of Minnesota.

17. The defendants named in paragraphs 1 through 16 shall be collectively referred to as the "Unity/Mercy defendants".

18. Defendant St. Cloud Hospital ("St. Cloud") is a hospital operating at 1406 6th Avenue N., St. Cloud, Minnesota 56303.

19. Defendants John Frobenius ("Frobenius") is the Chief Executive Officer of St. Cloud Hospital.

20. Defendant Linda Chimielewski ("Chimielewski") is the Vice President Hospital Operations of St. Cloud Hospital.

21. Defendant Anesthesia Associations of St. Cloud LTD ("AASC") is a professional partnership located at 816 West St. Germain St. Suite 403, St. Cloud, Minnesota

56301, whose anesthesiologist members maintain privileges at St. Cloud Hospital.

22. Defendants Gary A. Boeke, M.D. ("Boeke"), Philip F. Boyle, M.D. ("Boyle"), L. Michael Espeland, M.D. ("Espeland"), Alan D. Espelien, M.D. ("Espelien"), Paul J. Halverson, M.D. ("Halverson"), Lanse C. Lang, M.D. ("Lang") and A. Wade McMillan, M.D. ("McMillan"), William H. Rice, M.D. ("Rice"), Allan Reitz, M.D. ("Reitz") and Annette E. Zwick, M.D. ("Zwick") are medical doctors specializing in anesthesia who maintained privileges at St. Cloud Hospital at all times relevant to this Complaint and are members and/or employees of AASC.

23. Defendants in paragraphs 17 through 21 will hereinafter collectively be referred to as the "St. Cloud defendants."

24. Defendant Theodore Grindal, Esq. ("Grindal") is an attorney licensed to practice law in the State of Minnesota and was formerly a partner with the firm of Opperman, Heins & Paquin and is currently a partner with the Minneapolis law firm of Schatz Paquin Lockridge Grindal & Holstein.

25. Defendant Craig Johnson, M.D. ("Johnson") was at all times pertinent hereto President of the Minnesota Society of Anesthesiologists ("MSA") and maintains anesthesiology privileges at St. Cloud Hospital.

GENERAL ALLEGATIONS

26. This lawsuit stems from recent actions that have been taken and continue to be taken to dramatically alter the manner in which anesthesiological services are provided

to hospitals and patients in the Twin Cities market and every other market in the State of Minnesota.

27. Defendants have engaged in an illegal conspiracy to eliminate certified registered nurse anesthesiologists as competitors for provision of anesthesiological services wherever they compete with anesthesiologists. This conspiracy has already led to the termination of sixty-two (62) CRNAs previously employed by defendants Unity, Mercy and St. Cloud Hospitals, as well as the threatened imminant [sic] termination of all of the CRNAs employed by North Memorial Hospital, Abbott Northwestern Hospital, United Hospital, St. Johns Hospital, St. Joseph Hospital, Midway Hospital and several other prominent hospitals in the Twin Cities area and its outlying suburbs.

28. Following a blueprint proposed by defendant Grindal, defendant MDAs, all of whom are also members of the MSA, set out to conspire with members of the medical staff and administrative staff of defendant hospitals and other hospitals throughout the state to eliminate CRNAs who they saw as a lower cost provider of anesthesiological services, as competitors in the Twin Cities market and every other market where anesthesiologists compete with CRNAs for those services. A brief overview of how this conspiracy came about is necessary to understand defendants' position of market power in the Twin Cities' area.

HISTORY OF PROVISION OF ANESTHESIA IN THE UNITED STATES

29. Anesthesiology is a medical specialty which deals with the management of procedures for rendering a patient insensible to pain during surgical, obstetrical and

certain other medical procedures; the support of life functions under the stress of anesthetic and surgical manipulation; the clinical management of the patient unconscious for whatever cause; the management of problems in cardiac and respiratory resuscitation; the application of specific methods of inhalation therapy; and the clinical management of various fluid electrolyte and metabolic disturbances.

30. Certified registered nurse anesthetists are a group of health providers who are virtually unknown to the public at large, yet they administer more that 65% of the 26 million anesthetics given to patients each year in the United States. In 85% of rural hospitals, CRNAS are the *sole* anesthesia providers providing all aspects of anesthesia, including obstetrical, surgical and trauma stabilization services. While anesthesiologists, who are physicians, are often involved in the deliver of anesthesia services as part of an anesthesia care team, they are frequently absent from the operating room during the administration of anesthesia and for long periods of time during the surgery. It is the CRNA who, in most cases, performs the majority of the anesthesia procedures and who stays in the operating room with the patient throughout the operation.

31. Nurses, not doctors, were the first professional group to provide anesthesia services in the United States. Since the late 1800's, nurses have been providing anesthesia in response to surgeons' need for specially trained anesthetists.

32. Anesthesia was revolutionized in 1889 by Alice MaGaw, a nurse at St. Mary's Hospital in Rochester, Minnesota, which later became the Mayo Clinic.

33. During World War I, increased demand for anesthetists resulted in the training of nurses to provide anesthesia services both at home and abroad. Nurse anesthetists from the United States received foreign decorations for their contributions during World War I. In fact, it was not until after World War II that physicians became involved in anesthesia in any kind of wide-spread basis.

34. Since 1931, through its national association the American Association of Nurse Anesthetists, certified registered nurse anesthetists have produced educational and practice standards, implemented a certification process for nurse anesthetists and developed accreditation programs for nurse anesthesia education.

35. Currently, CRNAs work in every environment in which anesthesia is delivered, including traditional hospital, surgical suites, and obstetrical delivery rooms, offices of dentists, podiatrists, ophthalmologists and plastic surgeons, ambulatory surgical centers, the U.S. military, the U.S. public health services and veteran administration medical facilities.

36. No Federal or State statute requires that certified registered nurse anesthetists be supervised by an anesthesiologist, although some statutes provide that CRNAs must perform under the medical direction of a qualified physician. The Joint Commission on Accreditation of Health Care Organization also recommends that anesthesia performed by CRNAs be under the "supervision" of a physician. Minnesota law does not limit the scope of a CRNA's practice and does not require that CRNAs be medically directed. Since in practice there is

always a qualified physician in the form of a surgeon present at every operation, such requirements do not significantly restrict the CRNA's ability to provide anesthesia services in the absence of an anesthesiologist in virtually any setting.

37. The principal activity of most anesthesia providers who are in the clinical practice of medicine is in connection with the performance of surgery in a hospital. Ordinarily the patient about to undergo surgery does not chose his anesthesiology provider. That decision is usually made by the surgeon or assigned to the patient's case by the operating room supervisor or head of the anesthesiology department. It is not uncommon for a patient to have his first contact with the anesthesia provider just prior to being brought into the operating room for surgery.

38. While CRNAs are highly compensated because of the advanced medical services they perform, their compensation is roughly one-quarter of that which an MDA receives for performing roughly the same services.

39. Accordingly, historically since World War II, while anesthesia services have been provided in a variety of settings, including CRNAs only, anesthesiologists only and CRNAs under the direction of physicians or anesthesiologists, the majority of health care in the United States has been provided by way of anesthesia care teams. The anesthesia care teams are made up of a number of CRNAs who provide the majority of the anesthesia and related services under the direction of and/or supervision of an anesthesiologist. Such teams are the most cost effective method of providing anesthesia care since they utilize lower cost providers, CRNAs, and they minimize

the involvement of substantially higher cost providers, anesthesiologist MDAs.

IMPACT OF MEDICARE REGULATIONS ON THE PROVISION OF ANESTHESIOLOGICAL SERVICES

40. Since, on average, hospitals in the Twin Cities area that provide general surgical services provide approximately 30% of those services to Medicare related patients, Medicare strongly affects the way those hospitals operate.

41. Reimbursement for the provision of anesthesiological services has been treated uniquely by Medicare.

42. Prior to 1982, anesthesiologists and CRNAs did not compete with respect to Medicare reimbursements. This is because anesthesiologists billed under Part B of Medicare as independent health care practitioners whereas CRNAs' costs were billed by the hospital under Part A as part of the general costs of providing Medicare services.

43. Under pre-1982 Medicare regulations, anesthesiologists were permitted to supervise as many CRNAs as they wished and to bill for as many cases simultaneously as they wished. There was no limit on the number of concurrent cases for which an anesthesiologist could receive reimbursement for medically directing CRNAs, even though the direct participation of the MDA may have been minimal.

44. In 1982, in part as a result of what was believed to be wide-spread fraudulent billing practices by MDAs, Tax Equity And Fiscal Responsibility Act of 1982

("TEFRA") established conditions for anesthesiologists to fulfill in order to be paid for medically directing CRNAs. Those conditions were:

(a) Performs a pre-anesthesia examination and evaluation;

(b) Prescribes the anesthesia plan;

(c) Personally participates in the most demanding procedures of the anesthesia plan, including induction and emergence;

(d) Ensures that any procedure in the anesthesia plan that he or she does not perform are performed by a qualified anesthetist;

(e) Monitors the course of anesthesia administration at intervals;

(f) Remains physically present and available for immediate diagnosis and treatment of emergencies; and

(g) Provides indicated post anesthesia care.

45. These requirements were intended to ensure that anesthesiologists actually performed the work they were billing for. They in no way represented requirements based on any medical necessity or on the safety of the patient. This is clear from the fact that Medicare also provided for reimbursements of CRNAs whether medically directed or non-medically directed for performing all of the same procedures that anesthesiologists performed. Nevertheless, MDAs in the Twin Cities and elsewhere misrepresented these seven conditions of *reimbursement* as conditions of quality control. Accordingly, for the purpose of preserving their ability to be reimbursed and maximizing their income, and not for the safety of the patient, they began through their influence on hospital staffs to revise

hospital by-laws and amend procedures in the hospital to require their presence at particular times. As a result of this, CRNAs' ability to practice independently of MDAs, although not legally restricted by either Medicare or any other state or federal law, has been restricted by MDAs and the hospitals with which they associate.

46. Despite the enactment of the TEFRA requirements for reimbursement, MDAs in the Twin Cities continued to fraudulently bill and, in general, CRNAs continued to do the majority of the work involved with the provision of anesthesia services.

47. However, in or about 1983, Congress passed the Social Security Amendments of 1983 (Public Law 98-21) which created diagnosis-related groupings (DRGs). As a matter of inadvertence, CRNAs were left out of the DRGs, thereby impacting on hospitals' ability to bill for their services.

48. However, as a result of lobbying by CRNAs, in or about 1984, CRNAs obtained a pass-through provision in legislation which, as later amended, permitted hospitals to be reimbursed for CRNA costs on an interim basis until December 31, 1988.

49. Subsequently congress passed the Omnibus Budget Reconciliation Act of 1986 ("OBRA '86"), which established the ability for CRNAs to bill directly under Medicare Part B effective January 1, 1989.

50. With the passage of the OBRA '86 legislation, CRNAs became clearly defined as direct competitors with the defendant MDAs for the provision of anesthesia services to Medicare participants. In practice, since most CRNAs were employed by hospitals, they assigned their

independent billing rights to the hospital which billed Medicare on their behalf.

51. Another crucial change which was introduced in OBRA 86 was a change in the methodology for payment of anesthesiologists and nurse anesthetists. 42 C.F.R. 414.450 provided that, where an anesthesiologist was engaged in a single procedure and was not involved in any other concurrent cases, that, in most cases, the anesthesiologist would be paid 100% of the costs of the procedure regardless of whether any nurse anesthetist was involved. Thus, in such cases often referred to as "one-on-ones," the anesthesiologists may be paid for 100% of the work even if the CRNA performs the work. In contrast, if an anesthesiologist is involved in two or more concurrent cases, he will receive only a portion of the allocated cost of the procedure and the other portion will be paid to the CRNA. This change was crucial because it permitted an MDA, by fraudulent billing concurrent cases as "one-on-one," to deprive the CRNA and, therefore, the hospital (which employed the CRNA) of the ability to be compensated for the services actually performed by the CRNA while the MDA was out of the room supervising other cases.

52. Since 1989, under the current Medicare regulations as recently amended, CRNAs compete directly with anesthesiologists for payments from Medicare. Two bills are generated for every procedure in which anesthetists and anesthesiologists are involved. As a result of this, the widespread fraudulent billing practices of the anesthesiologists have become more apparent since Medicare, and other third party payers who have followed Medicare's lead, are receiving two bills for the same services.

53. Thus, the Medicare provisions, while intended to prevent fraudulent practices by anesthesiologists, have instead actually empowered anesthesiologists to limit CRNA practice and resulted in increased fraudulent billing by anesthesiologists in order to maximize their compensation.

ANESTHESIOLOGISTS IN THE TWIN CITIES MARKET HAVE AND EXERCISE MARKET POWER

54. Anesthesiologists, including defendant MDAs, have at all pertinent times to this Complaint possessed and exercised market power in the Twin Cities market. Evidence of this market power includes, but is not limited to, the following:

(a) On information and belief, the annual average income of MDAs in the Twin Cities area substantially exceeds that of MDAs in virtually every other state even though the annual average cost of health care in Minnesota is below the national average.

(b) On information and belief, average annual incomes for MDAs in the Twin Cities area exceeds $400,000.

(c) Nine anesthesia groups control over 85% of the market for anesthesiological services by MDAs.

(d) For the past ten (10) years, there has been virtually no competition among MDAs for the provision of anesthesiological services at major hospitals in the Twin Cities. Despite the fact that MDAs, including defendants, did not, prior to 1990, have exclusive agreements to provide anesthesiological services to Twin Cities hospitals, virtually no competitive bidding with respect

to such services has occurred in the past ten (10) years.

55. On information and belief, despite their relatively higher incomes, Minnesota MDAs spend far less time in the hospital than virtually any other medical doctor, including general surgeons.

56. The MDAs have created barriers to entry into the Twin Cities market which include the following:

(1) MDA's through their Association have misrepresented TEFRA requirements for reimbursement as quality of care requirements which are medically necessary for each operation thereby limiting CRNA's ability to practice independently;

(2) MDAs have engaged in conspiracies to deny CRNAs clinical privileges by amending hospital by-laws, downgrading CRNAs status as health care providers at the hospitals and other restrictive practices;

(3) The MDAs, through their national and state societies, have also initiated restrictive guidelines which restrict CRNAs from practicing regional anesthesia and performing other anesthesia services.

57. In addition to the above barriers to entry, MDAs possess market power through their status. MDAs sit on controlling boards of many of the Twin Cities hospitals. In addition, they exercise strong influence over the medical staffs of those hospitals as well as over the management of many health care organizations in the Twin Cities market.

THE CONSPIRACY IN THE TWIN CITY AREA

58. As will be detailed elsewhere in this Complaint, as a result of the MDAs' market power, defendants have engineered the termination of every CRNA employed by defendants Unity and Mercy and St. Cloud Hospitals, as well as the imminent termination of every CRNA employed at Abbott Northwestern Hospital. Virtually every other major hospital in the Twin Cities area is currently, as the result of defendants' efforts and the conspiracy in which the defendants are engaged, considering plans to terminate all of their CRNA employees. If these plans come to fruition, virtually every CRNA employed by a hospital in the Twin Cities area and throughout Minnesota will be terminated from his or her job.

59. Because of the dramatic changes in the health care market, including those in Medicare and other medical services' reimbursement policies, as well as the declining census in Minnesota and the changing health care market, MDAs, including defendants, have recognized that anesthesia services connected with surgeries, as well as the demand for anesthesia services in general have been and will continue to be declining. As a result, in a free market the demand for anesthesiologists and the potential price of anesthesiological services would also in all likelihood decline.

60. With the foregoing in mind, the defendants and their co-conspirators have set out to monopolize completely the market for anesthesia services in the Twin Cities area and to eliminate CRNAs as low cost competitors in those markets.

61. In furtherance of this conspiracy, defendant Grindal prepared a mass mailing of a letter in or about

October 28, 1992, which, while superficially represented itself to be general advice to anesthesiologists, was in fact a blueprint for the elimination of CRNAs in the Twin Cities area and throughout Minnesota. In particular, the letter informed MDAs that by raising "quality of care," "scheduling" and "staffing" issues, they might exclude and limit CRNAs ability to practice and compete and might compel hospitals to terminate their CRNA employees.

62. In addition to this mass mailing, on information and belief defendant Grindal attended meetings and provided anesthesiologists, including defendant anesthesiologists, with memoranda suggesting a similar blueprint. On information and belief, these memoranda and letters were provided to the hospitals, including defendant hospitals, in connection with the conspiracy to compel those hospitals to terminate CRNAs.

63. Defendant Grindal's letter, memorandum and oral statements were materially inaccurate in a number of respects and implied that the changes in the Medicare law would render CRNAs economically unviable for hospitals. In fact, the reverse was the case.

64. On or about January 8, 1993, attorneys representing the American Association of Nurse Anesthetists sent a letter to defendant Grindal demanding that he retract his inaccurate statements. However, he has refused to do so.

65. Pursuant to the Grindal blueprint, between October 1992 and the date of this complaint, defendant MDAs and their co-conspirators have engaged in numerous acts of misconduct with the intent and effect of eliminating CRNAs in the Twin Cities in general, and plaintiff CRNAs in particular, from competing with them as lower

cost and, therefore, more cost-effective anesthesia providers. The acts which defendants and their co-conspirators have engaged in include the following:

(a) Changing hospital by-laws to downgrade or restrict CRNAs' ability to practice.

(b) Changing credentialing processes to downgrade or restrict CRNAs' ability to practice.

(c) Changing hospital policies and procedures to limit CRNAs' ability to practice, including:

(1) restricting CRNAs' ability to perform certain procedures including the induction of anesthesia and regionals [sic] anesthesia;

(2) requiring CRNAs to keep patients asleep on the operating table with no medical necessity to do so in order to permit the anesthesiologist to return for the waking up of the patient;

(d) misrepresenting the law concerning CRNAs' legal ability to and competence to provide anesthesiological services;

(e) sending out inaccurate and misleading documents which disparage CRNAs and their abilities to practice anesthesia.

(f) limiting student CRNAs from performing routine anesthesia procedures necessary to obtain certification.

66. In addition to the foregoing and in combination therewith, the defendant anesthesiology groups and their co-conspirators have engaged in a wide-spread practice of fraudulent billing of anesthesia services in violation of Minn. Stat. 147 § 147.091 and Federal statutes, including § 1128(a)(1)(A). Such violations include, but are not

limited to, billing for services that they did not render, billing for operations at which they were not present and inaccurately designating operations as one-on-one for Medicare purposes.

67. In particular, defendants engaged in the following acts in furtherance of their combination conspiracy and agreement:

(a) Defendants MAN and MAPA engaged in fraudulent billing practices as described in the foregoing paragraphs with the intent that Medicare and other third party payors would refuse to reimburse CRNAs (and hospitals) for work performed by those CRNAs as a result of the fact that the anesthesiologists had already billed them for those services. Defendants succeeded in this goal and as a result Medicare and other third party payors rejected claims by the hospital to be reimbursed for CRNA services in connection with operations at which the CRNAs actually performed the work.

(b) In particular, in or about late 1991, Travelers Insurance Company performed an audit at Unity and Mercy Hospitals which revealed, among other things, that substantial numbers of anesthesia cases were being double billed, *i.e.,* that a CRNA and anesthesiologist were billing for the same services.

(c) As a result of this audit, a meeting took place between certain CRNAs at Unity/Mercy hospitals and Judy Haviland, Vice President of Unity/Mercy hospitals. At that meeting, CRNAs were informed of Traveler's audit result and were advised that Travelers had sent the hospital a letter instructing it not to bill for CRNA services where the anesthesiologist had separately billed.

CRNAs, at that meeting, advised the hospital that it was defendants MAN and MAPS who were, in fact, fraudulently billing Travelers, Medicare and others for work that they, in fact, never performed.

(d) Shortly thereafter a meeting was held with representatives of the defendant MDAs and certain Unity/Mercy CRNAs. At that meeting one of the MDAs remarked in words or substance that the CRNAs were getting what they deserved because they had sought (and obtained in OBRA '86), the legal authority to bill separately. As that MDA put it, the CRNAs had "stuck their heads out of the foxholes and they were now getting their heads shot off." The meeting was adjourned with the understanding that further action would be taken.

(e) Shortly after that meeting, however, CRNAs were advised that they would not be permitted to attend any further meetings regarding this subject with the MDAs.

(f) Subsequent to the above meeting, Judy Haviland was succeeded by defendant, John Murphy, who met with certain Unity/Mercy CRNAs who provided Murphy with documentary evidence in the form of anesthesia records which demonstrated that MDAs were fraudulently billing cases. Murphy advised those CRNAs that the President would take the matter to the Board. He also arranged a meeting with Healthspan's attorney to discuss how such fraudulent billing could be proved.

(g) After the meeting with Murphy, CRNAs were advised that Murphy had taken the matter to defendant MacNally, the Chief Executive Officer, and that MacNally had in turn presented the

issue to the Board of Directors. However, the CRNAs were not advised of the results of those meetings.

(h) Some time in or about February 1993, while these discussions were ongoing, the Unity/Mercy CRNAs, were advised that Unity/Mercy hospitals were going to participate in something called "operations improvement" ("OI"). It was explained that the purpose of OI was to improve the efficiency of the delivery of health care services by Unity/Mercy hospitals through the input of hospital employees. Over the next several months, CRNAs at Unity/Mercy engaged in extensive discussions, meetings and study to provide proposals to save money and reduce the cost of providing anesthesiological services at Unity/Mercy.

(i) Among the proposals developed by the CRNAs was a proposal which would save approximately a half a million in anesthesiology services. This proposal was presented to the hospital and nothing further was heard of it. However, on or about July 14, 1993, John Murphy met with the CRNA managers of Unity /Mercy and advised them in words or substance that the hospital had decided to "get out of the CRNA business." As a result, the CRNAs were informed the hospital intended to terminate every CRNA currently employed by the hospital and enter into an exclusive agreement with defendant MDAs to provide anesthesiological services. This was the first time that any CRNAs at Unity/Mercy were even aware that the hospital was discussing termination of CRNAs. Indeed, all of the discussions involving this subject were conducted secretly between Murphy and other hospital employees and defendant MDAs without disclosing them to the

CRNAs. At that same meeting, Murphy was asked whether he had considered the anti-trust implications of what the hospital and the MDAs were doing. Murphy responded that the matter had been considered with the hospital's attorneys.

(j) Sometime during this same time period, the hospital amended its by-laws to classify CRNAs as allied health professionals thereby precluding them from obtaining independent privileges at the hospital and further limiting their ability to practice independently of MDAs.

(k) On or about July 22, 1993, the Unity/Mercy CRNAs were notified that the hospital would terminate all of them effective December 31, 1993. During this same time frame, John Murphy stated that the termination of Unity/Mercy's CRNAs was just the beginning and that the same thing was going to happen at "every hospital". The Unity/Mercy CRNAs were also told that the hospital had agreed to an exclusive contract with defendant MAP and that the hospital would not deal either collectively or independently with the CRNAs. Shortly after this meeting one of the CRNAs, Fred Benjamin, went down to the Medical Staff secretary and asked for applications for hospital privileges and allied health privileges. Based upon advice from the hospital administration, the clerk refused to even give the CRNA an application. In short, CRNAs were advised that they were all to be terminated, that they had no say in the matter, that they had no ability to obtain privileges at the hospital and that the hospital refused to negotiate or deal with them independent of the defendant MDAs.

(l) During this same time period, one of the Unity/Mercy CRNAs attended a dinner and was informed by a member of the Board of Directors of Unity/Mercy hospital in words or substance that the CRNAs at Unity/Mercy were being terminated because of the MDA's fraudulent billing.

(m) Between July 1992 and December 1993, plaintiffs requested the right to negotiate with the hospital on a number of occasions and were categorically rejected. In or about December 1993, Unity/Mercy CRNAs were advised that they would not be terminated on December 31 because the hospital had not reached an agreement with the anesthesiologists. The CRNAs who had formed their own corporation again asked to bid to provide anesthesia services and were refused by the hospital.

(n) In or about October 1993, defendant Sperry stated to a number of Unity/Mercy CRNAs that the exclusive agreement with the hospital was for the purpose of obtaining power and control over the market for anesthesiological services. He stated in words or substance "as a group of anesthesiologists, we don't have much say and we could be replaced easily. But if we control all the anesthesia provided, we will have power." Sperry further indicated that the anesthesiologists did not intend to lose a single anesthesiologist or a single dollar of compensation as a result of the changes that were coming in the Minnesota market. On March 22, 1994, Unity/Mercy hospitals terminated all 48 CRNAs that were employed by the hospital.

(o) In furtherance of defendants' conspiracies, the CRNA manager and the individuals who had founded the CRNA corporation which had attempted to negotiate with the hospital were refused employment by the defendant MDAs.

(p) In order to compel CRNAs to subjugate themselves to the MDAs and to remove them as potential competitors to defendant MDAs, the hospital offered a severance policy which provided in pertinent part that CRNAs who refused employment with the MDAs would receive no severance. In contrast, CRNAs who accepted employment with the defendant MDAs were given 50% of their severance even though they would be employed. The clear intention of this agreement between the hospital and the MDAs was to compel and coerce the CRNAs to give up their independence and agree to be employed by defendant MDAs.

(q) Plaintiffs are informed and believe that the secret exclusive agreement between hospitals and defendant MDAs provides precisely for the amount of CRNAs to be hired and divides the profits made by the CRNAs between the defendant hospitals and the MDAs.

68. The defendants' conspiracy is not confined in any respect to defendant Unity and Mercy hospitals. Indeed, that conspiracy permeates the Twin Cities market for general surgical services and extends to other markets.

69. At St. Cloud Hospital, an outlying hospital, similar actions have led to the termination of another 18 CRNAs:

(a) Similar fraudulent billing practices occurred at St. Cloud. Defendant AASC billed for medically

directed operations as 1-1, thereby depriving the CRNAs of reimbursement from Medicare. The widespread nature of this practice reduced the economic value of the St. Cloud CRNAs to the Hospital. St. Cloud CRNAs challenged this practice. Shortly thereafter, in or about the summer of 1992, the operation improvement campaign was initiated at St. Cloud hospital. As at Unity and Mercy, St. Cloud CRNAs were excluded from the process and were not allowed to participate in aspects of the operation dealing with anesthesiology.

(b) In or about April of 1993, CRNAs were asked whether there would be a smooth transition if the CRNAs were terminated by the hospital.

(c) In July 1993, the hospital amended its by-laws to downgrade CRNA's status from associates to assistants. This action decreased the value of CRNA's to the hospital since it rendered them totally dependent on MDAs who were not hospital employees.

(d) Shortly thereafter, the CRNA credentialling process was changed to limit CRNAs' ability to practice certain procedures and further caused their dependence up MDAs.

(e) Sometime during this time frame, defendant Johnson, then President of the MSA, told the CRNA at St. Cloud that CRNAs' salaries were rising and MDAs' salaries were dropping. Accordingly, Johnson stated in substance that it was necessary to eliminate the CRNAs as competitors in order to stabilize and increase MDAs' salaries.

(f) On or about March 1, 1994, all St. Cloud CRNAs' were advised that they would be terminated on July 1, 1994. This position was revised while

negotiations continued between the MDAs and St. Cloud hospital. Subsequently, St. Cloud CRNAs were advised that they would be terminated on October 1, 1994. This date was later modified to November 1, 1994. Of the eighteen CRNAs terminated by the Hospital, only five were not offered employment by defendant AASC. Three of those five were former Presidents of plaintiff MANA.

70. As of this date, Abbott Northwestern, another Allina hospital in the Twin Cities market, has advised its CRNAs that it intends to eliminate all 46 of them imminently. Plaintiffs are informed and believe that the MDAs at Abbott Northwestern have engaged in similar anti-competitive conduct including limitation of student procedures, intimidation of CRNAs and informal limitation of CRNA procedures at that hospital. Following the Grindal blueprint, defendants have compelled the hospital to engage a study of CRNA anesthesia services as a smoke screen to disguise their illegal conspiracy to eliminate CRNAs for anti-competitive and retaliatory reasons.

71. As a result of defendants' conspiracy, similar studies have been initiated at Fairview Ridges Hospital, Fairview Southdale, St. Johns, St. Joseph's Hospital, University of Minnesota Hospital, United Hospital, North Memorial Medical Center, Fairview Riverside Medical Center, Midway Hospital and St. Paul Ramsey Hospital. The foregoing hospitals control over 80% of the Twin Cities market for general surgical services. If they were to terminate all of their CRNAs, it would have a devastating impact upon the market for anesthesia services in the Twin Cities area.

72. Furthermore, as a result of defendants' conspiracy, plaintiff CRNAs are precluded from simply moving to other hospitals to provide lower cost, cost-effective anesthesiological services. If defendants succeed in their conspiracy, the entire Twin Cities market and all of the outlying markets will be deprived of the ability to access the lower cost effective services that can be provided by CRNAs. Moreover, defendant MDAs and their co-conspirators shall exercise unmitigated control over the market for anesthesia services in the Twin Cities area and in every other significant market in Minnesota and, therefore, the price of those services.

73. At St. Francis Regional Medical Center in Shakopee, another Allina hospital serviced by MDAs from defendant MAN which is outside of the Twin Cities market, CRNAs have been threatened and intimidated. An attempt to terminate all CRNAs employed at the hospital was prevented only because the nurse's union stepped in.

74. In addition, to eliminate competitors currently competing in the market, defendant conspirators have taken steps to eliminate the supply of those competitors, i.e., the schools for certified registered nurse anesthetists. Recently, the medical director of Abbott Northwestern School, an anesthesiologist, sent a letter suggesting she would resign as medical director. A number of MDAs who previously were relied upon as lecturers have refused to give lectures at the School. In addition, MDAs in the various hospitals where the students receive clinical training are refusing to give those students the opportunity to perform the procedures which are necessary to graduate and obtain certification as CRNAs.

75. In concert with these activities, MDAs have been attempting to intimidate students in the various hospitals and to persuade them to leave the practice of nurse anesthesia and/or the Twin Cities area.

76. Finally, recent discussion of budgets for Abbott Northwestern indicate that the hospital may eliminate the school altogether within the next fiscal year.

77. Similar actions are occurring at Minneapolis School of Anesthesia.

78. Plaintiffs and defendants, including defendant hospitals, have received substantial revenue both from the Federal government in the form of Medicare and Medicaid payments and from private insurance companies and private third party payers, all of which are located out-of-state all of which funds flow across state lines in interstate commerce. In addition, plaintiffs and defendant physicians and hospitals utilize or prescribe substantial quantities of drugs, medications, surgical supplies, equipment and other products related to the provision of anesthesia which are manufactured out of state and shipped in interstate commerce. For these and other reasons stated herein, defendants' conduct alleged herein has occurred in interstate commerce and/or though local in nature has an effect on interstate commerce.

79. In summary, the defendants and their co-conspirators have been and continue to be engaged in a conspiracy combination and agreement to drive certified registered nurse anesthetists out of the competitive market for anesthesiological services in the Twin Cities area and, indeed, throughout Minnesota. Defendants have already been successful in eliminating CRNAs as competitors in three of the cities largest hospitals, Unity, Mercy

and St. Cloud. They are on the verge of eliminating CRNAs at several more hospitals, including Abbott Northwestern and North Memorial. Defendants and their co-conspirators have market power and are exercising that market power to obtain monopoly power.

COUNT ONE

80. Plaintiffs repeat and allege the allegations contained in paragraphs 1 through 78 as if the same were set forth herein at length.

81. The foregoing acts by defendants which were committed individually and collectively constitute an anti-competitive contract, combination, scheme, conspiracy, agreement and/or concerted action among two or more persons or distinct business entities.

82. Those persons and entities intended and/or did unreasonably harm and/or restrain competition and actually injured competition in violation of Sherman Anti-Trust Act 15 U.S.C. § 1.

COUNT TWO

83. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 81 if same were set forth herein at length.

84. The foregoing acts by defendants which were committed individually and collectively constitute, among other things, an anti-competitive contract, combination, scheme, conspiracy and agreement and/or concerted action among two or more persons or distinct business entities, by which those persons and entities intended to harm or

restrain competition and which actually injured competition in violation of Minnesota Statutes § 325D.53.

COUNT THREE

85. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 83 as if same were set forth herein at length.

86. The foregoing acts by the defendants which were committed individually and collectively constitute an agreement among competitors to refuse to deal with another competitor and/or an illegal boycott for anti-competitive purposes.

87. This boycott has had a direct anti-competitive effect on relevant markets, including the Twin Cities market, for provision of anesthesia services to hospitals and the Twin Cities market for the provision of anesthesia services to consumers and has and will substantially foreclose competition in those markets.

88. As a result of the acts of misconduct set forth above, defendants have committed a *per se* violation of Section 1 of the Sherman Anti-Trust Act.

89. Each of the defendants individually and all of the defendants jointly entered into and performed all of the aforesaid acts and activities in the furtherance of the contract combination scheme and conspiracy designed to injure plaintiffs and their business and property, and have accomplished their purpose.

90. The foregoing acts were performed by defendants individually and jointly with malice toward and/or reckless disregard for plaintiffs' rights.

COUNT FOUR

91. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 89 if same were set forth herein at length.

92. The foregoing acts of misconduct, including, without limitation, the wrongful termination of the Mercy Unity CRNAs by defendants associated with those Hospitals and the wrongful termination of the St. Cloud CRNAs by defendants associated with St. Cloud, constitute a conspiracy to monopolize and/or an intentional attempt to monopolize which has a dangerous probability of success and/or actual monopolization of the relevant markets, including the market for provision of anesthesiological services to hospitals and the Twin Cities market for the provision of anesthesiological services to consumers, all in violation of Section 2 of the Sherman Anti-Trust Act.

93. Plaintiffs have suffered damages as a result of defendants' misconduct.

COUNT FIVE

94. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 92 as if same were set forth herein at length.

95. The foregoing acts of misconduct by defendants constitute an illegal tying arrangement of two separate and distinct products, i.e., surgical services and anesthesiological services in violation of Sections 1, 2, 14, 15 and 26 of the Sherman Anti-Trust Act and the Clayton Anti-Trust Act. Defendants and their co-conspirators have market power in the tying market to coerce purchase of the tied product and defendants' conduct has and will foreclose a

substantial volume of commerce in the market for the tied product and/or has or will cause substantial anti-competitive effects in both the tied and tying markets.

96. Each of the defendants individually and all of the defendants jointly entered into and performed all of the aforesaid acts and activities in the furtherance of the contract combination scheme and conspiracy designed to injure plaintiffs and their business and property, and have accomplished their purpose.

97. Plaintiffs were injured in their business and/or property as a result of such tying arrangements.

98. The foregoing acts were performed by defendants individually and jointly with malice toward and/or reckless disregard for plaintiffs' rights.

COUNT SIX

99. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 97 as if same were set forth herein at length.

100. Unity, Mercy and St. Cloud hospitals and/or the other hospitals named herein constitute essential facilities which cannot be practically duplicated by would-be competitors.

101. It would be economically and technically unfeasible to replicate the hospitals and operating rooms controlled by defendants and denial of the use of such facilities inflicts a severe handicap on potential market entrants.

102. The foregoing acts of misconduct by defendants constitute an unreasonable denial to plaintiffs of essential facilities in violation of federal anti-trust law.

103. A denial of access to these essential facilities has and will substantially impact upon competition in the market for provision of anesthesia services to hospitals and to patients in the Twin Cities area.

COUNT SEVEN

104. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 102 as if same were set forth herein at length.

105. The foregoing acts of misconduct by defendants Grindal, Johnson, MAN, MAPA, AASC and the Unity/Mercy and St. Cloud MDAs constitute the act, use or employment of fraud, false pretense, false promise, misrepresentation, misleading statements or deceptive practices with the intent that others rely thereon in connection with the sale of services in violation of the Minnesota Consumer Fraud Act, Minn. Stat. 3325F.69.

106. Plaintiffs have suffered damages as a result of the actions referred to in paragraph 105 above.

107. The foregoing acts were performed by the above defendants individually and jointly with malice toward and/or reckless disregard for plaintiffs' right.

COUNT EIGHT

108. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 106 as if same were set forth herein at length.

109. Defendants Johnson, MAN, MAPA and AASC's acts of misconduct set forth in the foregoing paragraphs constitute deceptive trade practices in that defendants individually and collectively represented services in a deceptive manner and passed off services performed by CRNAs as services performed by MDAs, all in violation of Minn. Stat. 325D.44, *et seq.*, and defendants have disparaged the services and business of plaintiff CRNAs by spreading false and misleading representations of fact as set forth herein.

110. Plaintiffs have suffered damages as a result of the above defendants' actions.

111. The foregoing acts were performed by the above defendants individually and jointly with malice toward and/or reckless disregard for plaintiffs' rights.

COUNT NINE

112. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 112 as if same were set forth herein at length.

113. The foregoing acts of misconduct by defendants were committed with the intention to interfere with existing contractual and prospective business and economic relations of plaintiffs with third parties, including other hospitals, Medicare and defendant hospitals.

114. As a result of the above defendants' tortious interference with the contractual and prospective business and economic relations of plaintiffs, plaintiffs have suffered damage.

COUNT TEN

115. Plaintiffs repeat and reallage the allegations contained in paragraphs 1 through 113 as if same were set forth herein at length.

116. The foregoing acts of misconduct by defendants Johnson, MAN, MAPA, AASC, the Unity/Mercy MDAs and the St. Cloud MDAs constitute tortious conduct which interfered with plaintiffs' ability to compete with defendants and, therefore, constitute unfair competition under Minnesota law.

COUNT ELEVEN

117. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 115 as if same were set forth herein at length.

118. The foregoing acts of misconduct by the defendant hospitals constitute breach of the implied covenant of good faith and fair dealing contained in plaintiffs' employment agreements with defendant hospitals.

119. As a result of defendant hospitals' acts, plaintiffs have suffered damages.

COUNT TWELVE
(Against the Unity/Mercy Defendants)

120. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 118 as if same were set forth herein at length.

121. The Unity/Mercy defendants' acts of misconduct set forth in the foregoing paragraphs, including defendants' conspiracy to terminate the Unity/Mercy plaintiffs

as a result of those CRNA's complaints about defendant MDA's fraudulent billing practices constitutes prohibited action under the Minnesota Whistleblowing Statute, Minn. Stat. 181.932.

122. As a result of defendants' acts, the Unity/Mercy plaintiffs have suffered and will suffer damage.

COUNT THIRTEEN
(Against the St. Cloud Defendants)

123. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 121 as if same were set forth herein at length.

124. The St. Cloud defendants' acts of misconduct set forth in the foregoing paragraphs, including defendants' conspiracy to terminate the St. Cloud plaintiffs as a result of those CRNA's complaints about defendant MDA's fraudulent billing practices constitutes prohibited action under the Minnesota Whistleblowing Statute, Minn. Stat. 181.932.

125. As a result of defendants' acts, the St. Cloud plaintiffs have suffered and will suffer damage.

COUNT FOURTEEN

126. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 124 as if same were set forth herein at length.

127. The Unity/Mercy defendants' acts of misconduct set forth in the foregoing paragraphs, including defendants' conspiracy to terminate the Unity/Mercy CRNAs as a result of those CRNA's complaints about defendant

MDA's fraudulent billing practices constitutes wrongful termination in violation of public policy under state law.

128. As a result of defendants' acts, the Unity/Mercy plaintiffs have suffered and will suffer damage.

COUNT FIFTEEN

129. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 130 as if same were set forth herein at length.

130. The St. Cloud defendants' acts of misconduct set forth in the foregoing paragraphs, including defendants' conspiracy to terminate the St. Cloud CRNAs as a result of those CRNA's complaints about defendant MDA's fraudulent billing practices constitutes wrongful termination in violation of public policy under state law.

COUNT SIXTEEN
(Civil Conspiracy)

131. The foregoing acts described in Counts One through Sixteen were in aid of and part of a civil conspiracy between and among the defendants.

132. As a result of the above, each of the defendants is vicariously and independently liable for the damages caused by the actions of every other defendant in furtherance of defendants' civil conspiracy.

133. As a result of defendants' acts, plaintiffs have suffered damage.

WHEREFORE, plaintiffs jointly and severally demand judgment against defendants, jointly and severally, as follows:

A. A preliminary and permanent injunction enjoining defendants from further violations of the state and federal anti-trust laws and requiring defendants to eliminate all unlawful restrictions on the practice of plaintiffs and their profession.

B. An Order reinstating the Mercy/Unity plaintiffs as employees.

C. An Order reinstating the St. Cloud plaintiffs as employees.

D. A preliminary and permanent injunction enjoining defendants from taking any action, including termination of employment or reduction in pay or benefits, against any of the plaintiffs or any CRNAs or other persons as a result of their participation in or assistance of this action.

E. An Order requiring defendants to pay severance improperly withheld from plaintiffs.

F. Compensatory damages in an amount to be determined at trial.

G. Punitive damages as permitted by law.

H. Treble damages as provided by applicable law.

I. Interest, costs of suit and reasonable attorney's fees as provided by applicable law.

J. Awarding such other and further relief as the Court shall deem to be just and equitable.

2510 Minnesota
World Trade Center
30 East Seventh Street
St. Paul, MN 55101
(612) 227-7731

75 Livingston Avenue
Roseland, NJ 07068
(201) 535-1900

Dated: November 8, 1994

/s/ William S. Rosen
William S. Rosen (9349X)

STERN & GREENBERG

By: /s/ H J Stern
Herbert J. Stern
(3169)
David S. Stone

Attorneys for Plaintiffs

EXHIBIT B

12614091
NURSES FILE SUIT AGAINST 3 HOSPITALS NURSE ANESTHETISTS SAY CONSPIRACY ENDED JOBS
St. Paul Pioneer Press (ST) – THURSDAY, November 10, 1994
By: Judith Yates Borger, Staff Writer
Edition: Metro Final Section: Business Twin Cities Page: 1F
Word Count: 394

TEXT:
The Minnesota Association of Nurse Anesthetists charged in a lawsuit served Wednesday that Unity, Mercy and St. Cloud hospitals have conspired to form a "secret and exclusive agreement to divide profits" made through "fraudulent billing" between themselves and anesthesiologists.

In essence, the suit charges that anesthesiologists, who are doctors paid about four times as much as nurse anesthetists for performing roughly the same service, conspired with the hospitals to eliminate nurse anesthetists, who are lower-cost competitors. The defendants billed Medicare and third-party payers for services they did not render and billed for operations at which they were not present, the suit charges.

A spokeswoman from Allina Health System Corp., owner of Mercy in Coon Rapids and Unity in Fridley, declined to comment Wednesday because Allina had not yet been served with the suit. Other defendants are several Twin Cities anesthesiologists and Theodore Grindal, an attorney who, the complaint alleges, wrote the "blueprint" to eliminate the nurses. Grindal could not be reached for comment.

William S. Rosen, attorney for the nurses, declined to estimate how much money might be involved.

"I don't want to comment on that until discovery has been completed." he said. The first hearing on the suit is scheduled for Nov. 15.

In April, Unity, Mercy and St. Cloud hospitals told 62 nurse anesthetists that they would be laid off as employees and some of them rehired as contractors working for anesthesiologists. At the time, the hospitals said that Medicare wanted to pay for anesthesia services with just one fee, instead of two fees, one to the supervising anesthesiologist and one for the nurse anesthetist.

Nurses who refused employment with the anesthesiologists were offered no severance, according to the suit, while nurses who accepted employment were given 50 percent of their severance.

Nurse anesthetists are paid about $75,000 a year, according to the complaint. Anesthesiologists who contract with hospitals can earn as much as $400,000 a year, according to the complaint.

The suit charges that the "conspiracy" has led to threatened termination of all the nurse anesthetists in "several prominent hospitals in the Twin Cities and its outlying suburbs."

According to the complaint, nurse anesthetists administer more than 65 percent of the 26 million anesthetics given to patients in the United States each year. In 85 percent of rural hospitals, nurse anesthetists are the sole providers of anesthesia.

ST. CLOUD
Times
Friday, Nov. 11, 1994

Suit accuses 3 hospitals of conspiracy

St. Cloud Hospital named in court action as conspiring to get rid of nurse anesthetists

ST. PAUL – A group of Minnesota nurses has filed suit against three hospitals, including St. Cloud Hospital, charging they conspired with doctors to eliminate nurse anesthetists.

In a lawsuit filed Tuesday in federal court in St. Paul, the Minnesota Association of Nurse Anesthetists alleges St. Cloud Hospital, Unity Hospital in Fridley and Mercy Hospital in Coon Rapids conspired to form a "secret and exclusive agreement to divide profits" made through fraudulent billing between themselves and anesthesiologists.

In essence, the suit charges that anesthesiologists conspired with the hospitals to eliminate nurse anesthetists. Anesthesiologists are doctors, and they often are paid about four times as much as nurse anesthetists for performing roughly the same service.

The suit charges the "conspiracy" has led to threatened termination of all the nurse anesthetists in "several prominent hospitals in the Twin Cities and its outlying suburbs."

The suit charges the hospitals billed Medicare and third-party payers for services they did not render and billed for operations at which they were not present.

St. Cloud Hospital was served the legal papers Thursday, said Sue Mackert, hospital spokeswoman.

Last spring, Unity, Mercy and St. Cloud hospitals told 56 nurse anesthetists they would be laid off, and some of them would be rehired as contractors working for anesthesiologists. At the time, the hospitals said Medicare wanted to pay only one fee for anesthesia services. There used be two fees – one fee for the supervising anesthesiologist and one for the nurse anesthetist.

WHAT'S NEXT

There will be a hearing at 8:30 Tuesday at the Minneapolis federal courthouse. Marc Kessler, spokesman for the Minnesota Association of Nurse Anesthetists, said the plaintiffs will ask a judge to protect them from being penalized or disqualified by the defendants.

Nurses who refused employment with the anesthesiologists were offered no severance, according to the suit, while nurses who accepted employment were given 50 percent of their severance.

Twenty nurse anesthetists were laid off at St. Cloud Hospital last spring, Mackert said. Anesthesia Associates of St. Cloud, which contracts services with the hospital, hired 13 of them. The hospital was losing money because of changes in reimbursement for anesthesia services,

according to a hospital publication. The layoffs were a cost-effective move, it said.

Mackert said the claim that some nurses were denied severance packages does not apply to St. Cloud Hospital.

"All the CRNAs certified registered nurse anesthetists who were employed at the time of the layoffs received severance packages," Mackert said. They were consistent with the standard hospital severance package and included severance pay, continuation of benefits, career counseling and clerical services to assist in job searches, she said.

A spokeswoman from Allina Health System Corp., owner of Mercy in Coon Rapids and Unity in Fridley, declined to comment Wednesday because Allina had not yet been served with the suit. A call Thursday to Allina was not immediately returned.

William S. Rosen, attorney for the nurses, declined to estimate how much money might be involved.

Nurse anesthetists are paid about $75,000 a year, according to the complaint. Anesthesiologists who contract with hospitals can earn as much as $400,000 a year, according to the complaint.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA, *ex rel* MINNESOTA ASSOCIATION OF NURSE ANESTHETISTS,

Plaintiffs,

v.

ALLINA HEALTH SYSTEM CORP., UNITY HOSPITAL, MERCY HOSPITAL, MARK SPERRY, M.D., GARY BATGENSTOSS [sic], M.D., JOHN MURPHY, JAMES CUMMING, M.D., JOHN RYDBERG, M.D., MIDWEST ANESTHESIOLOGISTS, P.A., METROPOLITAN ANESTHESIA NETWORK, HEALTH BILLING SYSTEMS, INC., ALLEN TANK, THELMA M. ALBAY, M.D., MINDA CASTILLEJOS, M.D., TERI HEIL, M.D., SANG HONG, M.D., TED JANOSSY, M.D., RAYMOND KLOEPPER II, M.D., JOHN MAGDSICK, M.D., THOMAS MAGGS, M.D., THOMAS POLTA, M.D., JOHN ROSEBERG, M.D., JAI SUH, M.D., JEFFREY YUE, M.D., CRAIG JOHNSON, M.D., ST.

* Civil Action
* File No. 3-94-146

COMPLAINT FOR DAMAGES AND OTHER RELIEF UNDER THE FALSE CLAIMS ACT & DEMAND FOR JURY TRIAL

FILED IN CAMERA AND UNDER SEAL

CLOUD HOSPITAL, ANESTHESIA ASSOCIATIONS OF ST. CLOUD LTD., GARY A. BOEKE, M.D., PHILIP F. BOYLE, M.D., L. MICHAEL ESPELAND, M.D., ALAN D. ESPELIEN, M.D., PAUL J. HALVERSON, M.D., LANSE C. LANG, M.D., A. WADE McMILLAN, M.D., WILLIAM H. RICE, MD., ALLAN REITZ, M.D., and ANNETTE E. ZWICK, M.D., NORTH MEMORIAL HOSPITAL ANESTHESIA P.A., [other, known defendants], Does I through XX

Defendants.

Plaintiffs as and for their Complaint against defendants say:

JURISDICTION AND VENUE

1. This is an action to recover damages and civil penalties on behalf of the United States of America arising out of false and/or fraudulent claims presented by Defendants under the Federal Medicare Program. This action arises under the provisions of Title 31 U.S.C. Section 3729, *et seq.* popularly known as the False Claims Act which provides that the United States District Courts shall have exclusive jurisdiction of actions brought under that Act.

2. Under Section 3732(A), venue is proper in this District because defendants reside in this District and the

acts complained of herein occurred in the State of Minnesota, within this judicial district.

3. Under the Act, this Complaint has been filed *in camera* and will remain under seal for a period of at least sixty (60) days and shall not be served on the Defendant until the Court so orders. The Government may elect to intervene and proceed with the action in sixty (60) days after it receives both the Complaint and the material evidence and information.

PARTIES TO THE ACTION

4. *Qui tam* Plaintiff Minnesota Association of Nurse Anesthetists ("MANA") is an association formed for the purpose of preserving and advancing the profession of Certified Registered Nurse Anesthetists ("CRNAs") in Minnesota and, among other things, to engage in activities to promote and protect the legal rights of its members through, among other things, lobbying efforts, legal action and public relations activities. MANA has standing to bring this complaint for itself and on behalf of the United States Government pursuant to 31 U.S.C. § 3730. Various of MANA's members were employed by defendant hospitals at times relevant to this complaint. Hereafter, MANA will be referred to as "Relator."

5. As required under the False Claims Act, 31 U.S.C. Section 3730(a)(2), Relator has provided to the Attorney General of the United States and to the United States Attorney for the District of Minnesota, simultaneous with the filing of this Complaint, a statement of material evidence and information in Relator's possession related to the Complaint as well as a copy of this Complaint. The disclosure statement supports the existence of overcharges

and false claims by the defendants. MANA is the original source of this information under the Act.

6. Defendant Allina Health System Corp. ("Allina") is a non-profit corporation and integrated health care system.

7. Defendant Unity Hospital ("Unity") is a hospital operating at 550 Osborne Road in Fridley, Minnesota.

8. Defendant Mercy Hospital ("Mercy") is a hospital operating at 4050 Coon Rapids Boulevard in Coon Rapids, Minnesota.

9. Defendant Midwest Anesthesiologists, P.A. ("MAPA") is a Minnesota professional association which engages in, among other things, the provision of anesthesia services to the defendants Unity and Mercy Hospitals.

10. Defendant Metropolitan Anesthesia Network ("MAN") is a professional corporation which owns and controls MAPA, as well as other professional associations with anesthesiologists with privileges at Fairview Southdale Hospital, Fairview Ridges Hospital and several children's hospitals.

11. Defendant Allen Tank ("Tank") at all times pertinent hereto was an employee of either HBS, MAN or MAPA and performed business management function for these groups.

12. Health Billing Systems, Inc. ("HBS") is a Minnesota corporation which is owned and controlled by MAN and is responsible for providing billing services to MAN and MANA employees.

13. Defendants Thelma M. Albay, M.D. ("Albay"), Gary Baggenstoss, M.D. ("Baggenstoss"), Minda Castillejos, M.D. ("Castillejos"), David Cumming, M.D. ("Cumming"), Teri Heil, M.D. ("Heil"), Sang Hong, M.D. ("Hong"), Ted Janossy, M.D. ("Janossy"), Raymond Kloepper, II, M.D. ("Kloepper"), John Magdsick, M.D. ("Magdsick"), Thomas Maggs, M.D. ("Maggs"), Thomas Polta, M.D. ("Polta"), John Roseberg, M.D. ("Roseberg"), Jai Suh, M.D. ("Suh"), Jeffrey Yue, M.D. (Yue"), Mark Sperry, M.D. ("Sperry") and John Rydberg, M.D. ("Rydberg") are medical doctors specializing in anesthesia ("MDAs") who maintained privileges at Unity and/or Mercy Hospitals at all times relevant to this Complaint and are members of MAPA (hereinafter collectively the "Unity/Mercy MDAs").

14. The defendants named in paragraphs 1 through 13 shall be collectively referred to as the "Unity/Mercy defendants".

15. Defendant St. Cloud Hospital ("St. Cloud") is a hospital operating at 1406 6th Avenue N., St. Cloud, Minnesota 56303.

16. Defendant Anesthesia Associates of St. Cloud LTD ("AASC") is a professional partnership located at 816 West St. Germain St. Suite 403, St. Cloud, Minnesota 56301, whose anesthesiologist members maintain privileges at St. Cloud Hospital.

17. Defendants Gary A. Boeke, M.D. ("Boeke"), Philip F. Boyle, M.D. ("Boyle"), L. Michael Espeland, M.D. ("Espeland"), Alan D. Espelien, M.D. ("Espelien"), Paul J. Halverson, M.D. ("Halverson"), Lanse C. Lang, M.D. ("Lang") and A. Wade McMillan, M.D. ("McMillan"), William H. Rice, M.D. ("Rice"), Allan Reitz, M.D. ("Reitz")

and Annette E. Zwick, M.D. ("Zwick") are medical doctors specializing in anesthesia ("MDAs") who maintained privileges at St. Cloud Hospital at all times relevant to this Complaint and are members and/or employees of AASC.

18. Defendants in paragraphs 15 through 17 will hereinafter collectively be referred to as the "St. Cloud defendants."

19. Plaintiffs sue fictitious defendants Does I through XX, inclusive, because their names and/or capacities and/or facts showing them liable are not presently known.

THE ROLES OF ANESTHESIOLOGISTS AND OF CRNAs IN THE PROVISION OF ANESTHESIA

20. Anesthesia is a medical specialty which deals with the management of procedures for rendering a patient insensible to pain during surgical, obstetrical and certain other medical procedures; the support of life functions under the stress of anesthetic and surgical manipulation; the clinical management of the patient unconscious for whatever cause; the management of problems in cardiac and respiratory resuscitation; the application of specific methods of inhalation therapy; and the clinical management of various fluid electrolyte and metabolic disturbances.

21. Certified registered nurse anesthetists are a group of health providers who are virtually unknown to the public at large, yet they administer more that 65% of the 26 million anesthetics given to patients each year in the United States. In 85% of rural hospitals, CRNAs are

the *sole* anesthesia providers providing all aspects of anesthesia, including obstetrical, surgical and trauma stabilization services. While anesthesiologists, who are physicians, are often involved in the delivery of anesthesia services as part of an anesthesia care team, they are frequently absent from the operating room during the administration of anesthesia and for long periods of time during the surgery. It is the CRNA who, in most cases, performs the majority of the anesthesia services and who stays in the operating room with the patient and the surgeon throughout the operation.

22. The principal activity of most anesthesia providers who are in the clinical practice of medicine is in connection with the performance of surgery in a hospital. Ordinarily the patient about to undergo surgery does not choose his anesthesiologist provider. That decision is usually made by the surgeon or assigned to the patient's case by the operating room supervisor or head of the anesthesiology department. It is not uncommon for a patient to have his first contact with the anesthesia provider just prior to being brought into the operating room for surgery.

23. Historically, since World War II, while anesthesia services have been provided in a variety of settings, including CRNAs only, anesthesiologists only, and CRNAs under the direction of physicians or anesthesiologists, the majority of anesthesia care in the United States has been provided by way of anesthesia care teams. The anesthesia care teams are made up of a number of CRNAs who provide the majority of the anesthesia and related services under the direction of and/or supervision of an anesthesiologist. Such teams are the most cost effective method of providing anesthesia care since they utilize lower cost

providers, CRNAs, and they minimize the involvement of substantially higher cost providers, anesthesiologist MDAs.

MEDICARE REGULATIONS RELEVANT TO DEFENDANTS' FALSE CLAIMS

24. Since, on average, hospitals in the Twin Cities area, including defendant hospitals, that provide general surgical services provide approximately 30% of those services to Medicare related patients, Medicare strongly affects the way those hospitals operate.

25. Reimbursement for the provision of anesthesia services has been treated uniquely by Medicare.

26. Prior to 1982, anesthesiologists bills under Part B of Medicare as independent health care practitioners, whereas CRNAs' costs were billed by the hospital under Part A as part of the general costs of providing Medicare services.

27. Under pre-1982 Medicare regulations, anesthesiologists were permitted to supervise as many CRNAs as they wished and to bill for as many cases simultaneously as they wished. There was no limit on the number of concurrent cases for which an anesthesiologist could receive reimbursement for medically directing CRNAs, even though the direct participation of the MDA may have been minimal.

28. In 1982, in part as a result of what was believed to be wide-spread fraudulent billing practices by MDAs, the Tax Equity And Fiscal Responsibility Act of 1982

("TEFRA") was enacted, establishing conditions for anesthesiologists to fulfill in order to be paid for medically directing CRNAs. Those conditions were:

(a) Performs a pre-anesthesia examination and evaluation;

(b) Prescribes the anesthesia plan;

(c) Personally participates in the most demanding procedures of the anesthesia plan, including induction and emergence;

(d) Ensures that any procedure in the anesthesia plan that he or she does not perform are performed by a qualified anesthetist;

(e) Monitors the course of anesthesia administration at intervals;

(f) Remains physically present and available for immediate diagnosis and treatment of emergencies; and

(g) Provides indicated post anesthesia care.

29. Subsequently congress passed the Omnibus Budget Reconciliation Act of 1986 ("OBRA '86"), which established the ability for CRNAs to bill directly under Medicare Part B effective January 1, 1989. In practice, since most CRNAs were employed by hospitals, they assigned their independent billing rights to the hospitals, which billed Medicare for the CRNAs' services.

30. Another crucial change which was introduced in OBRA '86 was a change in the methodology for payment of anesthesiologists and nurse anesthetists. 42 C.F.R. 414.450 provided that, in most cases where an anesthesiologist was engaged in a single procedure and was not

involved in any other concurrent cases, the anesthesiologist would be paid 100% of the cost of the procedure regardless of whether any nurse anesthetist was involved. Thus, in such cases, often referred to as "one-on-ones," the anesthesiologists may be paid for 100% of the work even if the CRNA performs the work. In contrast, if an anesthesiologist is involved in two or more concurrent cases, he will receive only a portion of the allocated cost of the procedure and the other portion will be paid to the CRNA. This change was crucial because it permitted an MDA, by fraudulently billing concurrent cases as "one-on-ones," to increase the amount he was paid by Medicare substantially beyond that which he should have been paid.

DEFENDANTS' FALSE CLAIMS

31. This *Qui Tam* complaint is based upon the fact that for years the defendant anesthesiologists, with the knowledge and assistance of the defendant hospitals, have been billing Medicare for services which they either did not perform or which did not qualify for reimbursement under the applicable Medicare laws and regulations. In particular, while the Medicare regulations pertaining to reimbursement for anesthesia services have been amended from time to time, since 1988 an anesthesiologist was only entitled to be personally reimbursed for services provided by him in three specific situations, two of which are relevant here: (1) where he personally performs the anesthesia procedure; and (2) where he medically directs another qualified anesthesia provider (such as a CRNA) in connection with more than one procedure.

32. In order to be reimbursed for personally performing the anesthesia procedure, the anesthesiologist was

required to either (i) "personally perform the entire anesthesia procedure (Section 414.46(2)(i); or (ii) be "continuously involved in a single case involving a certified registered nurse anesthetist, an anesthetist assistant or a student nurse anesthetist" (Section 4.4.46(2)(ii)).

33. The United States Government and its Medicare intermediaries have repeatedly clarified that in order to be reimbursed for personally performing an anesthesia procedure, the anesthesiologist, at a minimum, *must be in the operating suite for the entire time that the procedure is being performed. Medicare News No. 123,* September 1993 ("for the anesthesiologist to bill using the AA modifier (a code for personally performed anesthesia procedure), he must be physically present in the operating suite while the CRNA is attending to the case. If the anesthesiologist is not continuously involved with the case, then it is considered neither personally performed nor medically directed"); *Letter Interpretation dated January 7, 1994 from the Division of Medical Services Payment Bureau of Policy Development to the American Society of anesthesiologists;* CCH *Medicare and Medicaid Guide* ¶ 3455, *Medicaid Carriers Manual* § 15018. Accordingly, if the anesthesiologist is not, at a minimum, continuously present at and involved in an anesthesia procedure, he is not entitled to reimbursement from Medicare for personally performing that procedure.

34. Relator's members have personal knowledge, however, that defendant anesthesiologists have routinely billed Medicare for personal performance of anesthesia procedures in which they were *not* continuously involved or present, as required by Medicare. Those bills were for services for which the defendant anesthesiologists knew they were not entitled to reimbursement from Medicare,

and were false or fraudulent claims within the meaning of 31 U.S.C. 3729.

35. The second basis for Medicare reimbursement of a physician anesthesiologist is for medically directing a CRNA or other anesthesia provider in two or more concurrent anesthesia procedures. In order to be entitled to such reimbursement, the anesthesiologist need not be present in the operating room at all times. As previously noted, however, he must comply with the following conditions:

(1) For each patient, the physician must –

(i) Perform a pre-anesthetic examination and evaluation;

(ii) Prescribe the anesthesia plan;

(iii) Personally participate in the most demanding procedures in the anesthesia plan, including induction and emergency;

(iv) Ensure that any procedures in the anesthesia plan that he or she doe snot perform are performed by a qualified individual as defined in program operating instructions;

(v) Monitor the course of anesthesia administration at frequent intervals;

(vi) Remain physically present and available for immediate diagnosis and treatment of emergencies; and

(vii) Provide indicated post-anesthesia care.

42 C.F.R. 405.552.

36. Relator's members have personal knowledge that during the past six (6) years defendant anesthesiologists

have billed for medically directed services without complying with the conditions set forth in 42 C.F.R. § 405.552. Those bills were for services for which the anesthesiologists knew they were not entitled to reimbursement from Medicare and were false or fraudulent claims under Section 3729.

37. For example, defendant anesthesiologists contravened the requirements of §405.552 by billing Medicare for medical direction as to procedures during which:

(a) They were not in the operating room during induction;

(b) They were not in the operating room during emergence;

(c) They were not in the hospital during a portion of the anesthesia procedure;

(d) They were not in the operating suite during a portion of the procedure;

(e) They were involved in personally performing procedures in another operating room or suite and, therefore, not available to participate in "the most demanding procedures in the anesthesia plan" or to "remain physically present and available for immediately diagnosis and treatment for emergencies"; and/or

(f) They were impermissibly supervising more than four concurrent procedures.

38. Defendant anesthesiologists also contravened the requirements of §405.552 as follows. Medicare does not provide reimbursement to anesthesiologists in a group practice for medical supervision of a procedure where one

member of the group substitutes for another during the course of the procedure, except as follows:

> If anesthesiologists are in a group practice, one physician member may provide the pre-anesthesia examination and evaluation while another fulfills the other criteria. Similarly, one physician member of the group may provide post-anesthesia care while another member of the group furnishes the other component parts of the anesthesia service. However, the medical record must indicate that the services were furnished by physicians and identify the physicians who rendered them.

CCH Medicare and Medicaid Guide, ¶3455.40, *Medicaid Carriers Manual*, §15018(C). Relator's members have personal knowledge that defendant anesthesiologists in group practices billed Medicare for medical direction of procedures during the course of which one group member had taken over the procedure from another under circumstances which precluded reimbursement from Medicare. Those bills were for services as to which the defendant anesthesiologists knew they were not entitled to reimbursement from Medicare, and were false or fraudulent claims within the meaning of 31 U.S.C.§3729. The defendant anesthesiologists have knowingly concealed such false claims by failing to sign in and out of the operating room during such procedures, thereby depriving Medicare of a standard medical record which, if fully and accurately prepared, would reveal defendants' fraud.

39. As CRNA's who daily worked alongside the defendant anesthesiologists at the defendant hospitals, Relator members have personal knowledge of defendants'

false claims by virtue of communications with defendants themselves, participation in the anesthesia procedures which were later fraudulently billed by the defendant anesthesiologists, and familiarity with hospital records disclosing defendants' fraud.

40. While defendant anesthesiologists have attempted to conceal their fraudulent billing, Relator's members learned of defendants' fraud when Medicare and others began rejecting true and accurate bills from the Defendant hospitals for anesthesia procedures performed by Relator's members on the ground that defendant anesthesiologists had already billed for personal performance of those procedures and been reimbursed.

41. At all times, defendant hospitals have been or should have been aware that defendant anesthesiologists were presenting false claims to Medicare. Rather than taking steps to prevent the fraud, however, Defendant hospitals have knowingly facilitated it.

42. Among other things, Defendant hospitals have knowingly (1) permitted defendant anesthesiologists to bill in a manner which impedes discovery of their false claims; (2) refused to require defendant anesthesiologists to sign in and out of operating rooms; (3) ignored complaints by Relator's members concerning the anesthesiologists' false and fraudulent billing practices; and (4) retaliated against Relator's members for reporting such fraud.

43. Most notably, after CRNAs (members of Relator) at defendants Unity and Mercy Hospitals reported to those hospitals and produced to them records documenting instances of fraudulent billing by anesthesiologist defendants, those hospitals, in concert with the anesthesiologists, fired the CRNAs and pressured them to become

employed by the anesthesiologists. Essentially the same scenario unfolded at defendant St. Cloud Hospital. These defendants were motivated by (1) the desire of the anesthesiologists to continue their fraudulent billing practices; and (2) the desire of the hospitals to avoid confrontation with the anesthesiologists over – but simultaneously to distance themselves from – the anesthesiologists' fraud. The firing by the hospitals and rehiring by the anesthesiologists of the CRNAs was calculated to accomplish these purposes by giving the anesthesiologists sole control over billing for all anesthesiological services – whether performed by the MDAs themselves, by CRNAs themselves, or by a combination of the two – thereby eliminating the risk that CRNAs would continue to expose the anesthesiologists' fraud by submitting to Medicare and others separate bills belying the fraudulent bills submitted by the anesthesiologists.

44. It is estimated that between 1988 and 1994 defendant anesthesiologists submitted in excess of 40,000 individual claims for reimbursement to Medicare for services performed at defendant hospitals. Relator is informed and believes that approximately 70% of these claims were false or fraudulent claims under Section 3729.

45. Accordingly, Relator estimates that approximately Twenty-Eight Thousand (28,000) false and/or fraudulent Medicare Part B claims were presented by defendants to the United States Government, its officers and/or employees. Relators estimate that the dollar amount defendants thereby fraudulently obtained exceeds Two Million Dollars ($2,000,000).

46. Defendants are liable under 31 U.S.C. §§ 3729 and 3730 for (a) penalties in the maximum amount of Ten

Thousand Dollars ($10,000.00) for each of these approximately 28,000 claims, plus (b) three times the amount of damages which the Government has sustained as a result of defendants' false claims.

COUNT ONE

47. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 46 as if the same were set forth herein.

48. Defendants have knowingly presented, or caused to be presented, to officers or employees of the United States Government, false or fraudulent claims for payment or approval in violation of 31 U.S.C. § 3729(a)(1).

COUNT TWO

49. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 48 if same were set forth herein.

50. Defendants have knowingly made, used, or caused to be made or used, false records or statements to get false or fraudulent claims paid or approved by the Government in violation of 31 U.S.C. § 3729(a)(2).

COUNT THREE

51. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 50 as if same were set forth herein.

52. Defendants have conspired to defraud the Government by getting false or fraudulent claims allowed or paid in violation of 31 U.S.C. § 3729(a)(3).

COUNT FOUR

53. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 52 as if same were set forth herein.

54. Defendants have knowingly made, used, or caused to be made or used, false records or statements to conceal, avoid, or decrease obligations to pay or transmit money or property to the Government in violation of 31 U.S.C. § 3729(a)(7).

COUNT FIVE

55. In addition to the misconduct described in the foregoing Counts, defendant hospitals have violated their obligations under their provider agreements with Medicare and have further conspired with defendant anesthesiologists to submit false and/or fraudulent claims to the United States Government.

WHEREFORE, plaintiffs demand judgment against defendants, and each of them, as follows:

a. That by reason of the violations of the False Claims Act as set out in the First through Fourth Causes of Action, this Court enter judgment against Defendants in an amount up to Three (3) times the amount of damages the United States Government has sustained because of Defendants' actions, plus a civil penalty of not less than Five Thousand Dollars ($5,000.00) and not more than Ten Thousand Dollars ($10,000.00) for each violation of 31 U.S.C. §3729;

b. That Relator as *Qui Tam* Plaintiff be awarded the maximum amount allowed pursuant to Section 3730(d)

of the False Claims Act and/or any other applicable provision of law;

c. That Relator be awarded all costs of this action, including attorneys' fees and court costs;

d. That Relator be awarded its expenses in connection with this action pursuant to 31 U.S.C. Section 3729.

e. That appropriate injunctive relief pursuant to 31 U.S.C. §3730(h) be awarded to Relator's members and others who have or may take lawful action in furtherance of this Complaint; and

f. That Plaintiff and the Relator receive such other and further relief as the Court may deem to be just and proper.

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Attorneys for Plaintiffs

Dated: December 28, 1994

TRIAL BY JURY

Plaintiffs hereby demand a trial by jury as to all issues.

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